TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 149

WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, AND THE PULLMAN COMPANY, PLAINTIFFS IN ERROR,

vs.

FRIEND W. RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED AUGUST 13, 1921.

(28,425)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1921.

1 In the Supreme Court of the State of California.

S. F. No. —.

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY (a Corporation), Plaintiffs and Appellants,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant and Respondent.

TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

Honorable Geo. A. Sturtevant, Judge.

2 In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 95285, Dept. No. 8.

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY (a Corporation), Plaintiffs,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant.

Complaint.

Plaintiffs file this their complaint against defendant and for cause of action allege that:

I.

Plaintiff, The Pullman Company, is, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and was during the period from January 1st to December 31st, 1917, both inclusive, except as hereinafter stated, engaged in the business of furnishing sleeping cars and parlor cars to railroad companies in said State of California, and in all other states of the United States of America, some of said cars running entirely within the said State of
3 California, and some from points without the state passing through said State of California to points in other states, and some running from points without the state to points within said state, and from points within said state to points without said state, but none of said cars during the year ending December 31 1917, ran

from points within California to other points within California and in the journey passed out of said state, except a line or route of two sleeping cars which, during said period beginning January 1st, 1917, and ending December 31st, 1917, ran between the City of Oakland in said state and the Town of Susanville, in said state, over lines of railroad partly within the State of California and partly within the State of Nevada. In all said cars plaintiff, The Pullman Company, transacted at all times during the period hereinbefore mentioned, a sleeping car business, viz: it furnished to the passengers of said railroads while being transported in said cars, as aforesaid, berths and seats in said cars so running entirely within said state and in said cars passing through, into and out of said state as aforesaid, and personal attendance and service rendered to such passengers by the agents and servants of the plaintiff, The Pullman Company, in connection therewith.

4 II.

In and by a proclamation by the President of the United States, dated the 26th day of December, 1917, the President took the possession of, and assumed the control, operation and utilization of, the sleeping and parlor cars of plaintiff, The Pullman Company, and all equipment and appurtenances thereof, and appointed William G. McAdoo Director General of Railroads, and directed that said possession, control, operation and utilization should be exercised by and through said William G. McAdoo as said Director General of Railroads. Thereafter on the 28th day of December, 1917, said William G. McAdoo, as said Director General of Railroads, assumed possession and control of the sleeping and parlor cars of said plaintiff, The Pullman Company, and the equipment and appurtenances thereof and, continuously thereafter and until the tenth day of January, 1919, exercised said possession, control, operation and utilization thereof, as provided in said proclamation and in an Act of Congress approved the 21st day of March, 1918, and entitled "An act to provide for the operation of transportation systems while under federal control, for the just compensation of their owners, and for other purposes." On said tenth day of January, 1919, in and by a proclamation by the President of the United States, said

5 President appointed Walker D. Hines, one of the plaintiffs herein, as said Director General of Railroads in place and stead of said William G. McAdoo, and on said tenth day of January, 1919, said plaintiff, Walker D. Hines, as said Director General of Railroads, pursuant to said last named proclamation, assumed possession and control of the sleeping and parlor cars of said plaintiff, The Pullman Company, and the equipment and appurtenances thereof, and continuously thereafter exercised, and does now exercise, said possession, control, operation and utilization thereof, as provided in said proclamations and in said Act of Congress. During all the time and times stated in this paragraph (II) said Directors General of Railroads, to wit, said William G. McAdoo until the tenth day of January, 1919, and plaintiff, Walker D. Hines, thereafter, has and have, in, with and by said cars and other

property of plaintiff, The Pullman Company, hereinbefore referred to, conducted said business theretofore conducted therein and therewith by plaintiff, The Pullman Company, and divers other business of the same general character.

III.

Defendant now is and was at all times herein mentioned Treasurer of the State of California.

6 IV.

The gross receipts of Plaintiff, The Pullman Company, on all of its said business beginning and ending entirely within said State of California for the year ending December 31st, 1917, was the sum of one million, two hundred fourteen thousand, four hundred sixty-three and 33/100 dollars ($1,214,463.33), which sum includes California's mileage proportion of all business done by said plaintiff, The Pullman Company, as hereinafter alleged between points in the State of California but passing en route through a portion of the State of Nevada. The proportion of the gross receipts of said plaintiff, The Pullman Company, for said year ending December 31st, 1917, from all its business passing through, into or out of said state, equal to the proportion that the mileage within said state bore to the total mileage over which such interstate business of said plaintiff, The Pullman Company, was done, was the sum of one million, one hundred eighty-two thousand, four hundred twenty-four and 90/100 dollars ($1,182,424.90).

V.

Within the time prescribed by law, to wit, on or about the 11th day of March, 1918, plaintiff, The Pullman Company, filed a report signed and sworn to by one of its said plaintiffs, The Pull-
7 man Company's officers, namely, its assistant secretary, upon a form prescribed by the State Board of Equalization, and showing, for the year ending said 31st day of December, 1917, in such detail and in manner and form as prescribed by said State Board of Equalization the various items of information required to be shown by section 10 of chapter 214 of the Statutes of California, 1917, approved May 11, 1917, the same being section 3665c of the Political Code of said state. In addition to the items so required to be shown, said report contained the following statement:

"This company is and was during all of said year engaged in the business of furnishing sleeping cars and parlor cars to railroad companies in which passengers are transported, some of which cars run in the State of California, and some run between points in the State of California but pass en route through a portion of the State of Nevada; and, in the transportation of passengers in interstate commerce, some run from other states into California and out of California into other states, and some of such cars pass through the State of California. In all such cars this company transacts

a sleeping car business and furnishes to the passengers berths and seats in its cars in the State of California, between points in the State of California but en route passing out of the state,
8 and from other states into the State of California, and from California to other states, and in and on cars that pass through the State of California. That under said item 15 there is stated the gross receipts from such classes of business as said State Board of Equalization has designated in its blank report to be reported separately, and that each item of gross receipts so shown in this report contains and includes that proportion of the gross receipts from the business passing through, into and out of the State of California as above stated which the mileage within that state bears to the total mileage over which such interstate business was done, as defined by sections 3 and 8 of chapter 214 of the Statutes of California, 1917, approved May 11, 1917, the same being sections 3664*a* and 3665*a* of the Political Code of said state, and as required by section 10 of chapter 214, Statutes of 1917, being section 3665*c* of the said Political Code.

"The amount of gross receipts from business beginning and ending within the State of California, as defined by said sections 3 and 8 of said chapter 214 was $1,214,463.33, which amount includes California's mileage proportion of all business done by this company between points in the State of California but passing en route through a portion of the State of Nevada.

9 "The proportion of the gross receipts from interstate business, being the proportion upon the mileage basis as stated above, and as provided and defined in said sections 3 and 8 of said chapter 214, and in paragraph 8 of section 10 thereof, amounted to $1,182,424.90.

"The Pullman Company protests that no portion of its receipts from its business done in its cars from other states into California or from California into other states, or from other states passing entirely through California to points beyond California is taxable in or by the State of California, and that no portion thereof may lawfully be taxed in or by the State of California, and that any tax levied by the State of California upon its interstate business as above stated, or upon the revenues therefrom, will constitute a burden upon interstate commerce, and will violate the provisions of article I, section 8 of the Constitution of the United States, and will tax the business and property of said company beyond and without the State of California."

VI.

At some time between the 1st day of April, 1918, and the third Monday before the first Monday in July, 1918, the exact time being to plaintiffs unknown, said board assesed and levied a tax of three and 95/100 (3.95) per cent upon said gross receipts of plain-
10 tiff, The Pullman Company, for the year ending December 31st, 1917, on all business of said plaintiff, The Pullman Company, beginning and ending entirely within said state, which amounted to one million two hundred fourteen thousand, four hun-

dred sixty-three and 33/100 dollars ($1,214,463.33), as aforesaid, and on that proportion of the gross receipts from all said plaintiff's, The Pullman Company's, business passing through, into, or out of said state that the mileage within said state bore to the total mileage over which such interstate business was done, which amounted to one million one hundred eighty-two thousand, four hundred twenty-four and 90/100 dollars ($1,182,424.90), as aforesaid, to wit, upon the total sum of two million, three hundred ninety-six thousand, eight hundred eighty-eight and 23/100 dollars ($2,396,888.23); said tax amounted to the sum of ninety-four thousand six hundred seventy-seven and 8/100 dollars ($94,677.08), and was assessed to said plaintiff, The Pullman Company.

VII.

On or about the 25th day of June, 1918, plaintiff, The Pullman Company, being dissatisfied with said assessment of taxes against it upon the gross receipts of and from its business for the year ending December 31st, 1917, as hereinbefore set forth, appeared be-
11 fore the State Board of Equalization and made written application to said board to have said assessment of taxes corrected, which application was denied by said board.

VIII.

Thereafter, and in the month of July, 1918, the Controller of State of said State of California, by notice partly written and partly printed, dated July 1st, 1918, notified plaintiff, The Pullman Company, of the levy of said tax for the year 1918, amounting to said sum of ninety-four thousand six hundred seventy-seven and 8/100 dollars ($94,677.08), and that the same was then due and payable, and of the time when said tax would become delinquent and the penalties to be added thereto if not paid. Said notice was received by said plaintiff, The Pullman Company, at its office in Chicago, Illinois, in due course of United States mail on the 8th day of July, 1918.

IX.

Thereafter, as plaintiffs are informed and believe, said Controller of State published notices, in certain newspapers, purporting to be published in accordance with law, which notices specified, first, that said Controller had received from said board the record of assessments for state taxes; second, that the taxes therein assessed were due and payable on the first Monday of July, 1918, and that
12 one half thereof would be delinquent on the sixth Monday after said first Monday of July, 1918, at six o'clock P. M., and that unless paid to the State Treasurer at said City of Sacramento, prior thereto, fifteen per cent, (15%) would be added to the amount thereof, and unless paid prior to the first Monday of February, 1919, at six o'clock P. M., an additional five per cent (5%) would be added to the amount thereof, and that the remaining one-

half of said taxes would become delinquent on the first Monday in February, 1919, at six o'clock P. M., and if not paid to said State Treasurer at said City of Sacramento prior thereto, five per cent (5%) would be added to the amount thereof.

X.

On the 9th day of August, 1918, at said City of Sacramento, plaintiffs tended to defendant, as Treasurer of said State of California, the sum of twenty-three thousand nine hundred eighty-five and 65/100 dollars ($23,985.65), gold coin of the United States of America, one-half of the taxes of plaintiff's The Pullman Company's, business for said year ending December 31st, 1917, at the rate of 3.95 per centum upon said sum of one million, two hundred fourteen thousand, four hundred sixty-three and 33/100 dollars
13 ($1,214,463.33), the gross receipts of said plaintiff, The Pullman Company, from operation, to wit, on business beginning and ending within the State of California during the year ending December 31st, 1917, and at the same time and place plaintiffs served upon and delivered to defendant, as said Treasurer, a written notice and tender theretofore executed by plaintiffs. Said defendant, as said Treasurer, then and there accepted said written notice and tender and filed the same in his office, and then and there refused to accept said sum tendered as aforesaid, or any sum less than forty-seven thousand three hundred thirty-eight and 54/100 dollars ($47,338.54).

XI.

Thereafter, and on said 9th day of August, 1918, plaintiffs claiming and protesting that a part of the said sum of ninety-four thousand six hundred seventy-seven and 8/100 dollars ($94,677.08) assessed to and levied against plaintiff, The Pullman Company, by the said State Board of Equalization as taxes for the year 1918, to wit, the sum of forty-six thousand seven hundred five and 78/100 dollars ($46,705.78) was illegal and void, paid and caused to be paid to the defendant, under protest as hereinafter stated, said sum of forty-seven thousand three hundred thirty-eight and 54/100 dollars ($47,338.54), and at the time of such payment to
14 said defendant of said sum of forty-seven thousand three hundred thirty-eight and 54/100 dollars ($47,338.54) filed with the said State Controller a written protest stating that plaintiffs claimed and protested that the assessment of taxes on so much of the gross receipts from the business of plaintiff, The Pullman Company, during the year ending December 31, 1917, as was and were from business passing through, into or out of the State of California was a tax on interstate commerce and upon property beyond the limits of the State of California and was illegal and void, and that the first half thereof included in the payment therewith made was twenty-three thousand three hundred fifty-two and 89/100 dollars ($23,352.89), and in said protest specified the grounds upon which said claim was founded.

XII.

On the thirtieth day of January, 1919, at said City of Sacramento, plaintiffs tendered to defendant, as Treasurer of said State of California, the sum of twenty-three thousand nine hundred eighty-five and 65/100 dollars ($23,985.65), gold coin of the United States of America, the second half of the taxes upon plaintiff's, The Pullman Company's, business for said year ending December 31, 1917, at the rate of 3.95 per centum upon said sum of one million, two hundred fourteen thousand, four hundred sixty-three and 33/100 dollars ($1,214,463.33), the gross receipts of said plaintiff, The Pullman Company, from operation, to wit, on business beginning and ending within the State of California during the year ending December 31, 1917, and at the same time and place plaintiffs served upon and delivered to defendant, as said Treasurer, a written notice and tender theretofore executed by plaintiffs. Said defendant, as said Treasurer, then and there accepted said written notice and tender and filed the same in his office, and then and there refused to accept said sum tendered as aforesaid, or any sum less than forty-seven thousand three hundred thirty-eight and 54/100 dollars ($47,338.54).

XIII.

Thereafter, and on said thirtieth day of January, 1919, plaintiffs claiming and protesting that a part of the said sum of ninety-four thousand six hundred seventy-seven and 8/100 dollars ($94,677.08) assessed to and levied against plaintiff, The Pullman Company, by the State Board of Equalization as taxes for the year 1918, to wit, the sum of forty-six thousand seven hundred five and 78/100 dollars ($46,705.78) was void, paid and caused to be paid to the defendant, under protest as hereinafter stated, said sum of forty-seven thousand three hundred thirty-eight and 54/100 dollars ($47,338.54), and at the time of such payment to said defendant of said sum of forty-seven thousand three hundred thirty-eight and 54/100 dollars ($47,338.54) filed with the State Controller a written protest stating that plaintiffs claimed and protested that the assessment of taxes on so much of the gross receips from the business of plaintiff, The Pullman Company, during the year ending December 31, 1917, as were from business passing through, into or out of the State of California was a tax on interstate commerce and upon property beyond the limits of the State of California and was illegal and void, and that the second half thereof included in the payment therewith made was twenty-three thousand three hundred fifty-two and 89/100 dollars ($23,352.89), and in said protest specified the grounds upon which said claim was founded.

XIV.

Said sum of one million, one hundred eighty-two thousand four hundred twenty-four and 90/100 dollars ($1,182,424.90), and the

whole thereof, was received by plaintiff, The Pullman Company, for berths and seats furnished in its cars employed in transporting passengers in interstate commerce, used and occupied by
17 persons while being transported in said cars from other states into said State of California, from said State of California into other states, and from other states through said State of California to still other states beyond the limits of California; and for the attendance and service of said plaintiff's, The Pullman Company's, agents and servants in connection with such transportation; that said berths and seats were furnished and used and said attendance and service furnished and performed partly in California and partly in another state or other states in journeys in said plaintiff's, The Pullman Company's, said cars from one state to another, and that no part thereof was for such use entirely within said State of California or entirely within any other state, and that said sum and the whole thereof was receipts of said plaintiff, The Pullman Company, from business conducted by it partly in one state and partly in another state or other states and carried on from one state into another state or states and that said business and the whole thereof in which said receipts were made and earned was commerce among the several states; that none of said earnings of one million, one hundred eighty-two thousand, four hundred twenty-four and 90/100 dollars ($1,182,424.90) was receipts for berths or seats or for service in any way in the transportation of passengers between points
18 in the State of California who, in the journey, passed out of said state; that the only earnings the said plaintiff company had for such business was between January 1st, 1917, and December 31st, 1917, for berths and seats and service in connection with the transportation of passengers in a line or route in which two sleeping cars were employed, running between the City of Oakland in the said State of California and the Town of Susanville in said state, but in the course of the journey passing out of said state; that the proportion of said earnings for berths and seats and service in the transportation of passengers between points in the State of California but in the course of the journey passing out of said state, based upon the proportion of mileage within the said state to the entire mileage over which such business was done, amounted to two thousand forty-one and 80/100 dollars ($2,041.80), which said sum is included in the sum of one million, two hundred fourteen thousand, four hundred sixty-three and 33/100 dollars ($1,214,463.33), gross receipts of said plaintiff, The Pullman Company, on all of its said business beginning and ending entirely within said State of California, as herein alleged.

XV.

Said sum of one million, one hundred eighty-two thousand
19 four hundred twenty-four and 90/100 dollars ($1,182,424.00), and the whole thereof, was received by plaintiff, The Pullman Company, in interstate commerce as aforesaid, and was a proportion, as hereinbefore alleged, of income earned and

received by said plaintiff company from the business conducted by it as aforesaid, to wit, the furnishing of berths and seats and attendance and service rendered by the agents and servants of said plaintiff, The Pullman Company, to persons who were being transported from one state to another state in its said cars principally and for the most part while said cars were without and beyond said State of California, and which said service was principally and for the most part without and beyond the limits of said State of California, and which cars were not, nor was any part thereof, situated in the State of California, except while employed in making trips upon railroads from one state to another, in the transportation of passengers into, out of, or through said State of California in commerce among the several states.

XVI.

That part of said tax of ninety-four thousand six hundred seventy-seven and 8/100 dollars ($94,677.08) so levied and assessed by said State Board of Equalization, to wit, forty-six thousand seven hundred five and 73/100 dollars ($46,705.78), and the whole
20 thereof, which was levied, assessed, computed and charged, or either levied, assessed, computed or charged, upon said sum of one million, one hundred eighty-two thousand, four hundred twenty-four and 90/100 dollars ($1,182,424.90), and upon any and every part, portion or proportion of the gross receipts from plaintiff's, The Pullman Company's, said business, or any business passing through, into or out of the State of California and passing from one state to another state, was and is a tax on the earnings of said plaintiff, The Pullman Company, in its business conducted from one state to another state or states, and was and is a tax on commerce among the several states and a burden on such commerce imposed under and by virtue of a Statute of California, and was and is a tax on the conduct of said commerce and on said plaintiff's, The Pullman Company's, right to engage therein in California, in violation of subdivision 3 of section 8, article I of the Constitution of the United States.

XVII.

Said tax of ninety-four thousand six hundred seventy-seven and 8/100 dollars ($94,677.08) so levied and assessed by said State Board of Equalization, and the whole thereof, was a tax for a period of time which up to the date of the bringing of the above en-
21 titled action, was wholly within the period of said federal control; the first half thereof was paid by said William G. McAdoo, as such Director General, and the second half thereof was paid by said plaintiff, Walker D. Hines, as such Director General, and that the whole of said tax was paid out of revenues derived from operations under federal control, as provided by said Act of Congress, which revenues were the property of the United States; that of said sum of forty-six thousand seven hundred five and 78/100 dollars

($46,705.78) hereinbefore stated and referred to, and hereinbefore and now alleged to have been levied, assessed, computed and charged upon a proportion of gross receipts from the business of plaintiff, The Pullman Company, passing through, into or out of said State of California and passing from one state to another, hereinbefore and now alleged to be a tax on commerce among the several states, and illegal and void, and also, as hereinafter alleged, a tax upon property without and beyond the limits of said State of California; was, and the whole thereof was, a tax for a period of time which up to the date of the bringing of the above entitled action, was wholly within the period of federal control, and plaintiffs allege that said last named sum was included in the payments hereinbefore al-
22 leged to have been made to the defendant as such State Treasurer out of revenues derived from operations under federal control and the property of the United States.

XVIII.

That part of said tax of ninety-four thousand six hundred seventy-seven and 8/100 dollars ($94,677.08) so levied and assessed by said State Board of Equalization, to wit, forty-six thousand seven hundred five and 78/100 dollars ($46,705.78), and the whole thereof, levied, assessed, computed and charged, or either levied, assessed, computed or charged, upon said sum of one million, one hundred eighty-two thousand, four hundred twenty-four and 90/100 dollars ($1,182,424.90), and upon any and every part, portion or proportion of the gross receipts from plaintiff's, The Pullman Company's said business, or any business passing through, into or out of said State of California, and passing from one state to another state, was and is a tax on the income of property and business of said plaintiff, The Pullman Company, situated without and beyond the State of California, and the enforcement of said tax against said plaintiff, The Pullman Company, and said payment thereof required by said defendant, as said Treasurer, as provided by said Statute of California and as hereinbefore set forth, would in fact take
23 from said plaintiff, The Pullman Company, its property and deprive it of its property without due process of law, in violation of the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, to wit, said sum of forty-six thousand seven hundred five and 78/100 dollars ($46,705.78), and did unlawfully take the property of the United States.

XIX.

That by reason of said proclamations and the provisions of said Act of Congress and other matters and things hereinbefore alleged and set forth in paragraph II hereof, plaintiff, The Pullman Company, has been and still is unable to conduct its said business or any part thereof for the time being and during the period of federal control provided in said Act of Congress, and until said period of federal control shall cease. Its right and privilege to transact busi-

ness and to contract and to resume and continue the transaction of its long established business in the State of California after said period of federal control shall cease, is, and all thereof is, a valuable right and privilege obtained by it and for many years prior to the time and times herein alleged, and now, retained by plaintiff, The Pullman Company, by compliance with the provisions of
21 the laws of California in that behalf enacted; of which valuable right and privilege it was possessed, and in the enjoyment thereof, at the time of taking possession of its said property and business by the President of the United States as hereinbefore alleged, which right and privilege plaintiff, The Pullman Company, has never forfeited. By the statute of the State of California under which said tax was levied and assessed, plaintiff's, The Pullman Company's, right and privilege to continue to do intrastate business in said State of California is made dependent on the payment, on or before an hour and day fixed in and by said statute, of said tax so levied and assessed by said State Board of Equalization as aforesaid, amounting to ninety-four thousand six hundred seventy seven and 8/100 dollars ($94,677.08), which includes said sum of forty-six thousand seven hundred five and 78/100 dollars ($46,705.78) so levied as aforesaid at three and ninety-five one-hundredths per cent (3.95%) on said sum of one million, one hundred eighty-two thousand, four hundred twenty-four and 90/100 dollars ($1,182,424.90), receipts from said plaintiff's, The Pullman Company's, said business in interstate commerce, as hereinbefore alleged; and in and by said statute it is provided that the right and privilege of said plaintiff, The Pullman Company, to transact
25 intrastate business in said State of California shall be forfeited at the hour and day fixed in and by said statute for its failure to pay to said State of California the taxes and money penalties as in said statute prescribed, which are the taxes hereinbefore set forth, including said tax levied on receipts from interstate commerce; and it is further provided in said statute that every person, after the hour and day so fixed and until said taxes and penalties are paid to said state, who transacts or attempts to transact any intrastate business in said state in behalf of any forfeited foreign corporation shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine or by imprisonment, or by both such fine and imprisonment; and that every contract made in violation of said provisions was and is declared to be void; and in and by said statute said plaintiff's, The Pullman Company's, right and privilege to continue to do intrastate business in said State of California or to transact any intrastate business therein, or to contract, was and is made dependent upon the payment of a tax, which said statute provides shall be levied, assessed, computed and charged upon the earnings of said plaintiff, The Pullman Company, in interstate commerce and which was so levied, assessed, computed and
26 charged thereon, and has been collected by the defendant, as hereinbefore alleged, under duress of said provisions of the law of California, whereby a burden was imposed upon the interstate business of said plaintiff, The Pullman Company, and upon

commerce among the several states in violation of subdivision 3 of section 8, article I of the Constitution of the United States, the provisions of which the plaintiffs expressly invoke; and said plaintiff's, The Pullman Company's right and privilege to continue to do intrastate business in said State of California, or to transact any intrastate business therein, or to contract, was and is by said statute made dependent upon payment of a tax upon income of property and business of said plaintiff. The Pullman Company, without and beyond said State of California, levied, assessed, computed and charged thereon by and under a statute of said State of California, which said statute provides shall be levied, assessed, computed and charged upon such income of property and business of said plaintiff, The Pullman Company.

XX.

After plaintiffs paid and caused to be paid to said defendant, as said Treasurer, as aforesaid, said sum of ninety-four thousand six hundred seventy-seven and 8/100 dollars ($94,677.08), to
27 wit, on said thirtieth day of January, 1919, at said City of Sacramento, plaintiffs demanded of said defendant, as said Treasurer, that said sum of forty-six thousand seven hundred five and 78/100 dollars ($46,705.78) paid under protest, as aforesaid, be returned and repaid to plaintiffs, but said defendant, as said Treasurer, then and there refused and neglected to return or repay to plaintiffs, or either of them, said sum, or any part thereof. Neither said sum nor any part thereof has been returned or repaid to plaintiffs, or to either of them, nor to said William G. McAdoo, as such Director General. Whereby a cause of action hath accrued to the plaintiffs, to wit: that said plaintiff, Walker D. Hines, as such Director General, have and recover from the defendant as said Treasurer, said sum of forty-six thousand seven hundred five and 78/100 dollars ($46,705.78) so, as aforesaid, paid under protest, upon the grounds stated in said protest, which are the grounds of illegality hereinbefore alleged, which allegations are herein and hereby adopted as fully as though the same were in this paragraph fully repeated.

Wherefore, plaintiffs pray judgment in favor of plaintiff, Walker D. Hines, as said Director General of Railroads, against defendant, as said Treasurer for the sum of twenty-three thousand three hundred fifty-two and 89/100 Dollars ($23,352.89), with in-
28 terest thereon from the 9th day of August, 1918, and the sum of twenty-three thousand three hundred fifty-two and 89/100 dollars ($23,352.89) with interest thereon from the 30th day of January, 1919, and their costs herein expended.

T. C. COOGAN,
BURKE CORBET,
Attorneys for Plaintiffs.
F. B. DANIELS,
G. S. FERNALD,
Of Counsel.

E OF CALIFORNIA,
City and County of San Francisco, ss:

A. Cooke, being duly sworn, deposes and says: That he is an
r, to wit, superintendent in and for the State of California, of
er D. Hines, as Director General of Railroads, one of the plain-
in the above-entitled action; that he has read the foregoing
plaint and knows the contents thereof, and that the same is true
s own knowledge, except as to the matters which are therein
l on information or belief, and as to those matters that he be-
s it to be true.

F. A. COOKE.

Subscribed and sworn to before me this 11th day of Feb-
ruary, 1919.

[SEAL.] M. I. LAWRENCE,
Notary Public in and for the City and County
of San Francisco, State of California.

Endorsed:) Filed Feb. 11, 1919. H. I. Mulcrevy, Clerk, by L.
elch, Deputy Clerk.

[Title of Court and Cause.]

Demurrer.

ow comes the defendant in the above entitled action, and de-
ring to the complaint of plaintiff on file herein, for ground of
urrer alleges:
at said complaint does not state facts sufficient to constitute a
e of action.
herefore, defendant prays that he may be hence dismissed with
osts of suit herein expended.

U. S. WEBB,
Attorney General of the
State of California;
RAYMOND BENJAMIN,
Special Counsel,
Attorneys for Defendant.

(Endorsed.)

rvice of copy of within demurrer admitted this 7th day of April,
.

T. C. COOGAN,
BURKE CORBET,
Attorneys for Plaintiffs.

iled Apr. 7, 1919.
H. I. MULCREVY,
Clerk,
y H. BRUNNER,
Deputy Clerk.

[Title of Court and Cause.]

Minute Order Sustaining Demurrer to Complaint.

Friday, May 8, 1919.

Present: Honorable Geo. A. Sturtevant, judge, and officers of the court.

Counsel for the respective parties herein present and consenting thereto, it is ordered that the defendant's demurrer to plaintiffs complaint on file be and the same is hereby submitted to the court for consideration and decision and taken under advisement. The court having now considered the same and being fully advised in the premises, it is ordered that said defendant's demurrer be and the same is hereby sustained.

[Entered in minutes of department No. 8, volume 129, page 315.]

31 [Title of Court and Cause.]

Judgment.

In this action it appearing to the satisfaction of the court that the demurrer of defendant to plaintiffs' complaint having been heretofore sustained by order, due notice of said order having been served upon plaintiffs herein, and plaintiffs having failed to appear and ask leave of court to amend their complaint, upon motion of attorneys for the defendant,

It is ordered that judgment be, and the same is hereby ordered in favor of defendant for his costs.

Dated: June 9, 1919.

GEO. A. STURTEVANT,
Judge of the Superior Court.

Wherefore, by reason of the law and the premises aforesaid,

It is ordered, adjudged and decreed that Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation, plaintiffs do take nothing by this said action as against Friend W. Richardson, as Treasurer of the State of Cali-
32 fornia, defendant, but that judgment be and the same is hereby entered herein in favor of said defendant and against said plaintiff- for said defendant's costs and disbursements incurred in this action, amounting to the sum of $—.

(Endorsed:) Recorded Jun. 11, 1919, 2.07 o'clock P. M., volume 130, page 436. H. I. Mulcrevy, Clerk, by Chas. A. Siskron, Deputy Clerk.

[Title of Court and Cause.]

Clerk's Certificate to Judgment Roll.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, H. I. Mulcrevy, county clerk of the City and County of San Francisco, State of California, and ex-officio clerk of the Superior Court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause, and recorded in judgment book 130 of said court, at page 436. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said cause.

33 Witness my hand and seal of said Superior Court this 12th day of June, A. D. 1919.

[SEAL.] H. I. MULCREVY,
Clerk,
By G. A. WEIHE,
Deputy Clerk.

(Endorsed:) Filed June 12, 1919. H. I. Mulcrevy, Clerk, by G. A. Weihe, Deputy Clerk. Recorded judgment book 130, page 436.

[Title of Court and Cause.]

Notice of Appeal from Judgment.

To the defendant above named and to U. S. Webb, Attorney General of the State of California, and Raymond Benjamin, Esq., special counsel, his attorneys:

Please take notice that the plaintiffs above named, Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation, do hereby appeal to the Supreme Court of the State of California from the judgment and the whole thereof,
34 rendered on June 9th, 1919, in the above-entitled action in favor of defendant and against plaintiffs, which said judgment was on June 11, 1919, recorded in the office of said clerk in volume 130 of judgment records at page 436.

Dated, July 10th, 1919.

T. C. COOGAN,
BURKE CORBET,
Attorneys for Plaintiff The Pullman Company.
F. B. DANIELS,
G. S. FERNALD,
Of Counsel.

(Endorsed.)

Service of the within is hereby acknowledged this 10th day of July A. D. 1919.

U. S. WEBB,
Attorney General;
RAYMOND BENJAMIN,
Attorneys for Defendant.

Filed Jul. 11, 1919.
H. I. MULCREVY,
Clerk,
By J. J. RAFFERTY,
Deputy Clerk.

35 *Stipulation to Transcript.*

It is hereby stipulated that the foregoing transcript on appeal is correct; that it contains full, true and correct copies of all the papers therein set forth now on file in the office of the county clerk of the City and County of San Francisco, State of California; that the minute orders therein contained are full, true and correct copies thereof as made and entered in the minutes of the Superior Court; that the said foregoing papers shall constitute the transcript on appeal in this cause and that the appeal may be heard and determined thereon.

It is further stipulated that a sufficient undertaking on appeal, in due form of law, has been properly filed in said cause in the manner and within the time required by law.

Dated, August 13, 1919.

U. S. WEBB,
Attorney General of the State of California;
RAYMOND BENJAMIN,
Attorneys for Respondent.
T. C. COOGAN,
BURKE CORBET,
CORBET & SELBY,
Attorneys for Appellants.
F. B. DANIELS,
G. S. FERNALD,
Of Counsel for Appellants.

36 *Clerk's Certificate to Transcript.*

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, H. I. Mulcrevy, county clerk of the City and County of San Francisco, State of California, and ex-officio clerk of the Superior Court in and for said city and county, hereby certify that I have compared the foregoing transcript with the original papers in said

action, now on file in my office, and with the orders therein made and entered on the minutes of said court, and that the papers and orders therein contained are full, true and correct copies of the originals on file in this office, and of the whole thereof.

I further certify that a sufficient undertaking on appeal, in due form of law, has been properly filed in said cause, in the manner and within the time required by law.

I further certify that the erasures and interlineations appearing in the foregoing transcript were made before certifying thereto.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court this — day of August, 1919.

[SEAL.] H. I. MULCREVY,
Clerk,

By —— ——,
Deputy Clerk.

37 In the Supreme Court of the State of California.

S. F. No. 9183.

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY, a Corporation, Plaintiffs and Appellants,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant and Respondent.

Petition for Writ of Error.

The petition of Walker D. Hines as Director General of Railroads, and The Pullman Company, a corporation, Plaintiffs and Appellants in the above-entitled action, respectfully shows unto your Honor:

That in said action, then pending in the Supreme Court of the State of California, entitled "Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation, Plaintiffs and Appellants, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant and Respondent," a judgment was entered by the said Supreme Court of the State of California therein on the 4th day of April, A. D. 1921, in favor of the said defendant and respondent, and against the said plaintiffs and appellants, which said judgment was duly entered in said Court upon the date aforesaid;

That the time within which a petition for a rehearing could be presented and filed in said action has now expired, and said judgment has become final;

That the said Supreme Court of the State of California is the highest Court of said state in which a decision could be had in this action;

That in the records, proceedings, and decision of said Court 38 a manifest error has occurred, greatly to the damage of the said plaintiffs and appellants, Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation, and said plaintiffs and appellants were and are aggrieved thereby;

That, as appears in the records and proceedings in said action there was drawn into question the power of the State of California, under its laws, to tax the gross receipts received by the said The Pullman Company, a corporation, one of the plaintiffs and appellants, for carrying passengers from one state to another, as being a tax on interstate commerce, and a tax upon the receipts from the business of the said The Pullman Company, a corporation, one of the plaintiffs and appellants, in carrying passengers from one state to another state, and from business within the State of California to points outside of the State of California, and from points outside of the State of California, to points within the said State of California, and from points without the State of California, passing through the State of California, to points outside of the State of California, and in violation of Paragraph 3 of Section 8 of Article I of the Constitution of the United States, reading as follows, to-wit:

"The Congress shall have power * * * to regulate commerce * * * among the several states;"

and there was also drawn into question the power of the State of California, under its laws, to levy, assess, compute, and collect a tax upon the income of the property and business of the plaintiffs and appellants, situated beyond the State of California, as to tax the same was to take the property of plaintiffs and appellants without due process of law, in violation of Section 1 of Article XIV of the Amend-
39 ments to the Constitution of the United States, reading as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;"

all of which fully appears in the records and proceedings in this action;

Your petitioners, the above named plaintiffs and appellants, in and by their complaint filed in said action, contended that the gross receipts from the transaction of interstate commerce are not taxable by the State of California; that the taxation thereof constituted an unwarranted and unlawful interference with and burden upon interstate commerce, as well as a deprivation of your petitioners of their property without due process of law, and a denial to your petitioners of an equal protection of the laws, contrary to the provisions of the Constitution of the United States, which contentions, on the part of your petitioners, and each and all thereof, were, in and by the judgment of the Supreme Court of the State of California, hereinbefore referred to, decided against your petitioners;

Wherefore, forasmuch as your petitioners believe that there was manifest error in said decision in said Supreme Court of the State of California against the several contentions of your petitioners, as hereinbefore set forth, and in the final judgment in said action, which is

to the great damage of your petitioners, your petitioners pray that your Honor will examine the records of the Supreme Court of the State of California, in that behalf, and allow your petitioners a writ of error, and order a transcript of the records, proceedings, and papers upon which said judgment was rendered, duly authenticated,
40 to be sent to the Supreme Court of the United States, to the end that said judgment and record may be brought before said Supreme Court of the United States, agreeable to the laws of the United States in that behalf enacted.

BURKE CORBET &
CORBET & SELBY,
F. B. DANIELS,
G. S. FERNALD,
Attorneys for Walker D. Hines, as Director General of Railroads, and The Pullman Company, a Corporation, Plaintiffs and Appellants.

Dated: June 30, A. D. 1921.

41 [Endorsed:] Original. S. F. No. 9183. In the Supreme Court of the State of California. Walker D. Hines, as Director General of Railroads, and The Pullman Company, a Corporation, Plaintiffs and Appellants, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant and Respondent. Petition for Writ of Error. Filed Jun. 30, 1921. B. Grant Taylor, Clerk, by M. Corbet & Selby, Attorneys at Law, 1201 First National Bank Building, San Francisco, California.

42 In the Supreme Court of the State of California.

S. F. No. 9183.

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY, a Corporation, Plaintiffs and Appellants,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant and Respondent.

Assignments of Error.

Now comes Walker D. Hines, as Director General of Railroads, and The Pullman Company, plaintiffs and appellants, and aver that the judgment rendered and entered in the above-entitled cause, by the Supreme Court of the State of California, on the 4th day of April, A. D. 1921, is erroneous and unjust to your petitioners, and that, in the records and proceedings therein, there is manifest error; and plaintiffs and appellants file and present the following assignments of error, upon which they will rely upon their prosecution of their petition for a Writ of Error in the above-entitled cause:

I.

The Supreme Court of the State of California erred in deciding that the complaint of the plaintiffs therein, Walker D. Hines, as Director General of Railroads, and The Pullman Company, these plaintiffs and appellants, does not state facts sufficient to constitute a cause of action, in that the said complaint does state a cause of action, viz.:

1. For the recovery of money by the plaintiffs and appellants against the said defendant and respondent, the same having been paid under protest by the plaintiffs and appellants, Walker D. Hines as Director General of Railroads, and The Pullman Company,
43 as and for a tax levied, assessed, computed, and collected under Section 14 of Article XIII of the Constitution of the State of California, as said Constitution was amended November 8, 1910, and under Sections 3 and 8 of Chapter 214 of the Statutes of the State of California, approved May 11, 1917, the same being Sections 3664*a* and 3665*b* of the Political Code of the said State, and as required by Section 10 of said Chapter 214, being Section 3665*c* of said Political Code, upon the gross receipts and earnings from the said business of The Pullman Company, one of said plaintiffs and appellants, passing through, into, and out of the State of California, and the gross receipts and earnings from interstate business, and that the same was a burden upon interstate commerce, and a regulation of such commerce, to-wit, commerce among the several states, contrary to the provisions of Subdivision 3 of Section 8 of Article I of the Constitution of the United States, reading as follows, to-wit: "The Congress shall have power * * * to regulate commerce * * * among the several states";

2. That said taxes levied, assessed, based, and computed upon such gross receipts from the said interstate business, or any part thereof, are void for the further reason that they are assessed upon the income of property and business of the Pullman Company, one of said plaintiffs and appellants, situated beyond the State of California, and to tax the same is to take the property of the plaintiffs and appellants without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, reading as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;"

3. That the said tax was a tax on the gross earnings of the said The Pullman Company, one of said plaintiffs and appellants, in its business conducted from one state to another state or states, and was and is a tax on commerce among the several states, and a
44 burden on such commerce, under and by virtue of the laws of California, and was and is a tax on the conduct of said commerce, and on the right of plaintiffs and appellants to engage

therein, in California, in violation of Subdivision 3 of Section 8 of Article I of the Constitution of the United States, above referred to;

4. That said tax, so levied, assessed, computed, and charged by the said defendant and respondent was an imposition upon the interstate business of the plaintiffs and appellants, upon commerce among the several states, in violation of the said Subdivision 3 of Section 8 of Article I of the Constitution of the United States, which said provisions were expressly invoked in said complaint by these plaintiffs and appellants, and that the said right and privilege of plaintiffs and appellants to so transact intrastate business in said State of California was and is, by said laws of the State of California, made dependent upon payment of a tax upon gross receipts in part from interstate commerce, and upon income of property and business of the plaintiffs and appellants without and beyond said State of California, levied, assessed, computed, and charged thereon by and under the statutes aforesaid of the said State of California, the laws of which said state, above referred to, provide that said taxes shall be levied, assessed, computed, and charged upon the income of property and the business of plaintiffs and appellants, as aforesaid;

5. That the said plaintiffs and appellants, in the manner and form, and at the times required by the laws of said State of California, above referred to, and under protest, did, prior to the commencement of said action, duly pay to the said defendant and respondent, as such Treasurer, the sum of Twenty-three Thousand Three Hundred and Fifty-two and 89/100 Dollars ($23,352.89), paid August 9, 1918, and the further sum of Twenty-three
45 Thousand Three Hundred and Fifty-two and 89/100 Dollars ($23,352.89), paid January 30, 1919, in all the sum of Forty-six Thousand Seven Hundred and Five and 78/100 Dollars ($46,705.78), and that thereafter the said plaintiffs and appellants did demand the repayment to them of the said sum so paid as aforesaid, which said demand was duly refused, and that the said sum of money had not been returned to these plaintiffs and appellants, and demand for the repayment thereof was duly set forth in said complaint;

6. An action for the recovery of taxes claimed to be illegal and paid under protest is expressly provided for by the laws of California.

II.

The Supreme Court of the State of California erred in not reversing the judgment of the trial court and in failing to give plaintiffs and appellants their rights under the Constitution of the United States, as claimed and set forth in the record in said action.

Wherefore, for these and other manifest errors appearing in the record, the said Walker D. Hines, as Director General of Railroads, and The Pullman Company, plaintiffs and appellants, pray that the judgment of the said Supreme Court of the State of California be reversed and set aside, and that judgment be rendered for the plain-

tiffs and appellants, as prayed for in their said complaint, and for judgment for their costs.

BURKE CORBET &
CORBET & SELBY,
F. B. DANIELS,
G. S. FERNALD,
Attorneys for Walker D. Hines, as Director General of Railroads, and The Pullman Company, Plaintiffs and Appellants.

Dated: June 30 A. D. 1921.

46 [Endorsed:] (Copy.) S. F. No. 9183. In the Supreme Court of the State of California. Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation, plaintiffs and Appellants, vs. Friend W. Richardson, as Treasurer of the State of California, defendant and respondent. Assignments of error. Filed Jun. 30, 1921. B. Grant Taylor, clerk, by M. Corbet & Selby, attorneys at law, 1201 First National Bank Building, San Francisco, California.

47 In the Supreme Court of the State of California.

S. F. No. 9183.

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY, a Corporation, Plaintiffs and Appellants.

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant and Respondent.

Allowance of Writ of Error.

Now comes Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation, Plaintiffs and Appellants above named, on this 30 day of June, A. D. 1921, and file and present to this Court their petition praying for the allowance of a writ of error, intended to be urged by them, and praying further that a duly authenticated transcript of the records, proceedings, and papers, upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper; and, upon consideration of said petition, this Court, desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions, therein presented;

F. M. A. It is Ordered [by this court]* that a Writ of Error be allowed, as prayed; provided, however, that said Walker D. Hines, as Director General of Railroads, and The Pullman Company, plaintiffs and appellants, give a bond according to law in the

sum of Five Hundred Dollars ($500.00) for damages and costs, said bond not to operate as a supersedeas bond.

Witness my hand this 30 day of June A. D. 1921.

F. M. ANGELLOTTI,
Chief Justice of the Supreme Court
of the State of California.

48 [Endorsed:] (Copy.) S. F. No. 9183. In the Supreme Court of the State of California. Walker D. Hines, as Director General of Railroads, and The Pullman Company, a Corporation, Plaintiffs and Appellants, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant and Respondent. Allowance of Writ of Error. Filed Jun- 30 1921. B. Grant Taylor, Clerk. By M. Corbet & Selby, Attorneys at Law, 1201 First National Bank Building, San Francisco, California.

49 In the Supreme Court of the United States.

(S. F. No. 9183.)

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY, a Corporation, Plaintiffs in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of California, before you, or some of you, being the highest Court of law or equity of the said state, in which a decision could be had in the said suit between Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation, Plaintiffs and Appellants, and Friend W. Richardson, as Treasurer of the State of California, Defendant and Respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed

under the Constitution, or any treaty or statute of, or com-
50 mission held, or authority exercised, under the United States,
and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened, to the great damage of the said plaintiffs and appellants, as by their Complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, that the records and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Joseph McKenna, Senior Associate Justice of the Supreme Court of the United States, the 30 day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-one.

Done in the City and County of San Francisco, with the Seal of the District Court of the United States, for the Northern District of California attached.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the District Court of the United States, Northern District of California.

Allowed this 30 day of June, 1921.

F. M. ANGELLOTTI,
Chief Justice of the Supreme Court of the State of California.

51 [Endorsed:] Original. No.—. In the Supreme Court of the United States. (S. F. No. 9183.) Walker D. Hines, as Director General of Railroads and The Pullman Company, a Corporation, Plaintiffs in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Writ of Error. Filed Jun- 30 1921. B. Grant Taylor, Clerk. By M. Corbet & Selby, Attorneys at Law, 1201 First National Bank Building, San Francisco, California.

52 In the Supreme Court of the United States.

(S. F. No. 9183.)

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY, a Corporation, Plaintiffs in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Friend W. Richardson, as Treasurer of the State of California, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of California, wherein Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation, are the plaintiffs in error, and Friend W. Richardson, as Treasurer of the State of California, is the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of California, this 30 day of June, A. D. 1921.

F. M. ANGELLOTTI,
Chief Justice of the Supreme Court of the State of California.

Attest:

[Seal of Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.

53 City and County of San Francisco, State of California, July 1, 1921.

We, the undersigned, attorneys of record for the defendant in error in the above-entitled cause, hereby acknowledge due service of

the attached citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

U. S. WEBB,
Attorney General for the State of California, Humboldt Bank Building, San Francisco, California;
RAYMOND BENJAMIN,
Chronicle Building, San Francisco, California, Attorneys for Friend W. Richardson, as Treasurer of the State of California, Defendant in Error.

54 [Endorsed:] Original. No. —. In the Supreme Court of the United States. (S. F. No. 9183.) Walker D. Hines, as Director General of Railroads, and The Pullman Company, a Corporation, Plaintiffs in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Citation. Filed Jun. 30, 1921. B. Grant Taylor, Clerk, by M. Corbet & Selby, Attorneys at Law, 1201 First National Bank Building, San Francisco, California.

55 In the Supreme Court of the United States.

(S. F. No. 9183.)

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY, a Corporation, Plaintiffs in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents:

That we, Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation organized under the laws of the State of Illinois, as principals, and Burke Corbet and John R. Selby, of the County of Santa Clara, State of California, as sureties, are held and firmly bound unto the above-named Friend W. Richardson, as Treasurer of the State of California, defendant in error, in the sum of Five Hundred Dollars ($500.00), to be paid to him, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 29 day of June, A. D. 1921.

Whereas, the above named Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation, plaintiffs in error, seek to prosecute their Writ of Error in the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the Supreme Court of the State of California;

Now, therefore, the condition of this obligation is such,
56 that, if the above-named plaintiffs in error shall prosecute their writ of error to effect, and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

WALKER D. HINES,
As Director General of Railroads, and
THE PULLMAN COMPANY,
A Corporation,
By BURKE CORBET,
Their Attorney.
BURKE CORBET. [SEAL.]
JOHN R. SELBY. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Burke Corbet and John R. Selby, whose names are subscribed as sureties to the above bond, being severally and duly sworn, each for himself, says: That he is a resident and freeholder of the State of California, and is worth more than the sum on said bond specified as the penalty thereof, over and above all his just debts and liabilities, in property not by law exempt from execution in this state.

BURKE CORBET.
JOHN R. SELBY.

Subscribed and sworn to before me, this 29 day of June, A. D. 1921.

H. B. DENSON,
Notary Public in and for the City and County of San Francisco, State of California.

This Bond approved this 30 day of June A. D. 1921.

F. M. ANGELLOTTI,
Chief Justice of the Supreme Court of the State of California.

56½ [Endorsed:] (Copy.) (S. F. No. 9183.) In the Supreme Court of the United States. No. —. Walker D. Hines, as Director General of Railroads, and The Pullman Company, a Corporation, Plaintiffs in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Bond on writ of error. Filed Jun. 30, 1921. B. Grant Taylor, Clerk, by M. Corbet & Selby, Attorneys at Law, 1201 First National Bank Building, San Francisco, California.

563¼ In the Supreme Court of the United States.

No. —. (S. F. No. 9183.)

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY, a Corporation, Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Præcipe.

To the Clerk of the Supreme Court of the State of California:

You are hereby requested that, in transmitting a true copy of the record of the Supreme Court of the State of California to the Supreme Court of the United States, pursuant to the Writ of Error heretofore granted, issued, and filed, as required by law, in the above-entitled action, you make up and incorporate into the transcript of the record on such Writ of Error the following portions of the record in said case in your office, namely:

1. Transcript on appeal to the Supreme Court of the State of California;

2. Petition for Writ of Error;

3. Assignments of Error and Prayer for Reversal;

4. Order Allowing Writ of Error;

5. Bond and Approval thereof;

6. Writ of Error;

7. Citation with admissions of service thereupon;

8. Stipulation of the parties as to elimination of the Opinion of the Supreme Court of the State of California from the transcript of the record, and consent to argument and consideration of this and other related cases in the Supreme Court of the United States at one and the same time;

57 9. This Præcipe, admission of serivec, and stipulation;

together with all endorsements of the filing thereof, as to each of said papers, showing the time of the filing of each of them in your office.

Dated: July 18, A. D. 1921.

F. B. DANIELS,
G. S. FERNALD,
BURKE CORBET,
JOHN R. SELBY,
Attorneys for Plaintiffs in Error.

We do hereby admit service of the foregoing Request upon us at the City and County of San Francisco, State of California, this 19th day of July, A. D. 1921.

U. S. WEBB.
Attorney General of the State of California;
RAYMOND BENJAMIN,
Attorneys for the Above-named Defendant in Error.

We hereby stipulate and agree that the portions of the record in the above-entitled action, set forth in the foregoing Request of the attorneys for the Plaintiffs in Error, are sufficient, and are all of the record of said action deemed necessary by us to be incorporated in the record on the Writ of Error in said action, and when so prepared by the Clerk shall constitute the transcript of the record on the Writ of Error aforesaid.

U. S. WEBB.
Attorney General of the State of California;
RAYMOND BENJAMIN,
Attorneys for Defendant in Error.

Dated: July 19, A. D. 1921.

38 [Endorsed:] No. —. In the Supreme Court of the United States. (S. F. No. 9183). Walker D. Hines, as Director General of Railroads, and The Pullman Company, a corporation, Plaintiffs in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Præcipe. Filed Jun. 30, 1921. B. Grant Taylor, clerk, by —— ——. Corbet & Selby, Attorneys at Law, 1201 First National Bank Building, San Francisco, California.

39 In the Supreme Court of the United States.

No. —. (S. F. No. 9183.)

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY, a Corporation, Plaintiffs in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Stipulation.

Whereas, the following mentioned seven cases, now and heretofore pending in the Supreme Court of the State of California, viz., six thereof being entitled "The Pullman Company, a Corporation, Plaintiff and Appellant, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant and Respondent," and being numbered in said State Court as S. F. Nos. 9080, 9081, 9082, 9083, 9084, and 9085, respectively, and one of said cases being entitled "Walker D. Hines, as Director General of Railroads, and The Pullman Company, a Corporation, Plaintiffs and Appellants, vs. Friend W. Rich-

ardson, as Treasurer of the State of California, Defendant and Respondent," and being numbered therein S. F. No. 9183, were all heard, considered, and determined in the said State Court at one and the same time, and the said State Court did render its decision and opinion therein, in all of said cases, at one and the same time, which said decisions and opinions, so rendered, were identical in each of said cases; and,

Whereas, a Writ of Error to the said Supreme Court of the State of California, from the Supreme Court of the United States, has been allowed, issued, filed, and served, and made returnable to the said Supreme Court of the United States in each of said cases, according to law and the course of procedure and practice of the said Su-

60 preme Court of the United States; and,

Whereas, all of said parties in all of said cases deem it advisable to abridge the length of the transcript to be returned with said Writs of Error in each of said cases, consistent with the course of procedure and practice of the said Supreme Court of the United States, and that the said opinion of the said State Court in but one of said cases be taken to the said Supreme Court of the United States, and that all of said cases be considered, heard, and determined upon said Writs of Error in the said Supreme Court of the United States at one and the same time;

Therefore, it is hereby stipulated and agreed, by and between the said respective plaintiffs in error and the said respective defendants in error, in each and all of said cases, that, with the return of the transcripts upon the return of said Writs of Error, in each of said cases, to the Supreme Court of the United States, there be incorporated in said case designated as S. F. No. 9080 a copy of the opinion and decision of the said Supreme Court of the State of California, hereinbefore referred to, and that a copy of the said opinion and decision in each of the other of said several cases be and the same is hereby dispensed with; and

It is further stipulated and agreed that each and all of said several cases shall be heard, considered, and determined in the Supreme Court of the United States at one and the same time, said opinion and decision in said case designated as S. F. No. 9080 being considered as a part of the transcript of the record in this case;

It is further stipulated that this stipulation be incorporated in and become a part of the transcript of the record upon the return of each of said several writs of error in each of said cases, upon the return of each of said transcripts of the said record in each of said

61 cases to the Supreme Court of the United States.

Dated this 18 day of July, A. D. 1921.

F. B. DANIELS,
G. S. FERNALD
BURKE CORBET,
JOHN R. SELBY,
Attorneys for the Plaintiffs in Error.
U. S. WEBB,
Attorney General for the State of California;
RAYMOND BENJAMIN,
Attorneys for the Defendant in Error.

62 [Endorsed:] (Copy.) (S. F. No. 9183.) In the Supreme Court of the United States. No. —. Walker D. Hines, as Director General of Railroads, and The Pullman Company, a Corporation, Plaintiffs in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Stipulation. Filed Jun. 30, 1921. B. Grant Taylor, Clerk, by M. Corlet & Selby, Attorneys at Law, 1201 First National Bank Building, San Francisco, California.

63 S. F. 9183.

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY, a Corp., Plaintiffs, Appellants,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant, Respondent.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the *Proceeding* and annexed is a true and correct copy of transcript on appeal in the above entitled case; original petition for writ of error; copy of assignment of errors; allowance of writ of error; original writ of error; copy of bond; original citation; præcipe; and stipulation as to record on writ of error, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 28th day of July, A. D. 1921.

[Seal of the Supreme Court of California.]

B. GRANT TAYLOR,
Clerk,

By I. ERB,
Deputy Clerk.

Endorsed on cover: File No. 28,425. California Supreme Court. Term No. 470. Walker D. Hines, as Director General of Railroads, and The Pullman Company, plaintiffs in error, vs. Friend W. Richardson, as treasurer of the State of California. Filed August 13th, 1921. File No. 28,425.

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WM. R. STANSBU
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

~~143~~ 148

Nos. 464, 465, 466, 467, 468, 469.

THE PULLMAN COMPANY,

Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California.

No. [redacted] 149

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY,

Plaintiffs in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF PLAINTIFFS IN ERROR.

CORDENIO A. SEVERANCE,
Attorney for Plaintiffs in Error.

GUSTAVUS S. FERNALD,
BURKE CORBET,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

Nos. 464, 465, 466, 467, 468, 469.

THE PULLMAN COMPANY,

Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California.

No. 470.

WALKER D. HINES, as Director General of Railroads, and THE PULLMAN COMPANY,

Plaintiffs in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

These cases, which involve the same questions, come to this court by writ of error to the Supreme

Court of California. They are suits brought for the purpose of recovering from the Treasurer of that State taxes for the years 1911 to 1915 inclusive, 1917 and 1918, paid under protest by The Pullman Company, plaintiff in error, upon a mileage proportion of its gross receipts from interstate commerce, under the gross receipts tax law of the State.

The Constitutional Provision.

Article XIII, Section 14, of the Constitution of the State of California, an amendment adopted in 1910, provides that all sleeping car, dining car, drawingroom car and parlor car companies operating upon the railroads in the State shall pay an annual tax upon their

> "franchises, roadways, roadbeds, rails, rolling stock * * * and other property or any part thereof, used exclusively in the operation of their business in this state"

which tax shall be equal to three per cent of the gross receipts from the operation of such companies within the State, the legislature being given the power to change the rate of taxation at any time by a two-thirds vote of the members elected to each house.

The amendment also provides that when such companies are operating partly within and partly without the State, the gross receipts within the State shall be deemed to be all receipts on business beginning and ending with the State, and

> "*a proportion based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into or out of this state.*" (Italic ours.)

The taxes so provided for are exclusively for state purposes and in lieu of all other taxes and licenses, State, county and municipal upon the operative property of such companies.

THE STATUTE.

Pursuant to this constitutional amendment, the legislature enacted Chapter 335, Laws of 1911. This Act, the first two sections of which are identical with the constitutional provisions, defines in Section 7 thereof, "gross receipts from operation" for the calendar year as including in the case of companies operating partly within and partly without the state,

> "all receipts on business beginning and ending within this state *and the proportion based upon the proportion of the mileage within this state to the entire mileage over which such business is done of receipts on all business passing through, into or out of this state.* (Italic ours.)

Section 9 of the Act provides for the annual report of gross receipts on such classes of business as the State Board of Equalization may designate to be reported separately,

> "*also, where the property and business are partly within and partly without the State,* the gross receipts for said period on all business beginning and ending entirely within the state, *and that proportion of the gross receipts from all business passing through, into, or out of this state, which the mileage within this state bears to the total mileage over which such interstate business is done as further defined in section seven of this act.*" (Italics ours.)

Section 20 of the Act states that the taxes levied under it for the calendar year preceding shall be

due and payable on the first Monday in July in each year; that one-half thereof shall become delinquent on the sixth Monday thereafter and if unpaid at that time, shall be subject to an addition of 15 per cent of the amount delinquent, and if still unpaid on the first Monday in the following February shall be subject to an addition of 5 per cent more; and that the remaining one-half thereof shall become delinquent on the first Monday in the following February, and if unpaid shall be subject to an addition of 5 per cent.

Under Section 23 of the Act, the taxpayer's sole remedy in case of illegal taxation is a suit for recovery of the amount of the tax paid into the State Treasury under written protest, and this suit must be brought not later than the third Monday in February following the date on which the tax was due.

Section 24 of the Act (as amended by Chapter 6, Laws of 1913) provides that within ten days after the first Monday in February, the comptroller shall notify the delinquent taxpayer that the tax is delinquent, stating the amount of the tax, penalties and costs, and if the same is not paid on or before the Saturday preceding the first Monday of March thereafter, the delinquent taxpayer, if it be a domestic corporation, will forfeit its charter to the State, and if it be a foreign corporation, will forfeit its right to do business in the State, *and there follow provisions for such forfeiture without any judicial hearing or inquiry as to the legality of the tax.*

Section 24a of the Act (added by Chapter 320, Laws of 1913) provides that it shall be unlawful for any company delinquent in the payment of the tax to exercise its powers or transact its business in the state after such forfeiture takes effect, and that any person exercising any of its powers or transacting any business for it (save to settle its affairs) shall be guilty of a misdemeanor and on conviction shall be fined not less than twenty-five nor more than one hundred dollars for each day of violation of the law.

The Legislature in 1913, by Chapter 6, Laws of 1913, amended Chapter 335, Laws of 1911, as provided by the constitution, by increasing the rate of taxation from three to four per cent.

The above constitutional and statutory provisions are referred to more fully in an appendix to this brief.

History of Litigation.

The Pullman Company, the plaintiff in error is an Illinois corporation, engaged in the business of furnishing sleeping cars and parlor cars to railroad companies in the State of California and other states, some of the cars being run between points within the State of California, and others from points within to points without or vice versa, or from points without to other points without but passing through the state en route.

The State of California, acting by and through its State Board of Equalization, proceeded under the foregoing constitutional and statutory provisions to levy and assess taxes upon the gross receipts of the plaintiff in error from the operation of its business in the state, not only locally but from all business passing through, into or out of the state. The plaintiff in error filed the annual reports prescribed showing its gross receipts from business beginning and ending entirely within California for each year and the proportion of gross receipts for each year from all business passing through, into or out of California equal to the proportion that the mileage within the State bore to the total mileage over which the interstate business was done, protesting that the latter item was not taxable by the State. The Board of Equalization proceeded, however, to levy and assess taxes upon such receipts, which the plaintiff in error paid to the State Treasurer under protest for each year from 1911 to 1915 inclusive, and for 1917 and 1918.

The present actions were instituted for the purpose of recovering the taxes so paid, following the refusal of demands upon the State Treasurer for their return. Nos. 464 to 469 inclusive were brought for the recovery of the taxes paid for the years 1911 to 1915 and 1917, respectively; No. 470 for the recovery of the taxes paid for the year 1918. No. 470 differs from the other actions in that by reason of so-called "Federal control" of the business of The Pullman Company as a result of the Federal Control Act of March 21, 1918, (40 Stat. 451) and the President's proclamation under the Act of August 29th, 1916, the taxes, recovery of which is sought in the action, were paid by the Director General of Railroads out of the funds in his possession and under his control as such, and judgment is asked in favor of the Director General. Nos. 464 to 468, inclusive, were tried without a jury before the Superior Court of the State of California in and for the County of San Francisco, judgment being entered in favor of the defendant in each case. Motions for new trials being denied, the cases were appealed to the Supreme Court of California. Nos. 469 and 470 were heard on demurrer to the complaint before the same trial court, the demurrers being sustained and judgment being entered in favor of the defendant in each case. Appeals were also taken in these cases to the Supreme Court of California. The Supreme Court of California affirmed the decision of the trial court, ordering entry of judgment in favor of the defendant and respondent in that court in

each case and against the plaintiff and appellant. The cases are now brought to this court by writ of error.

The grounds of objection to the tax will be stated fully hereafter. It is here sufficient to state that the plaintiff in error claims that the tax in dispute is invalid in that it is a tax and burden on interstate commerce and on the right of the plaintiff in error to engage in such commerce in California; that it is a tax on the income of the property and business of the plaintiff in error without the State of California, and its enforcement deprives plaintiff in error of its property without due process of law; and that the right of the plaintiff in error to continue to do business in California is made dependent on the payment of a tax which is a burden on interstate commerce and a tax on the income of property and business without the State.

Specification of Errors Relied Upon.

First. The Supreme Court of the State of California erred in holding that the gross receipts of plaintiff in error arising from interstate transportation—being a proportion of the gross receipts from its business passing through, into or out of the State, based upon the proportion of the mileage within the State to the entire mileage over which said interstate business was done—were subject to taxation by the State; and in not holding that the taxation of such receipts or any part thereof constituted an unlawful interference with and burden upon interstate commerce.

Second. The said court erred in holding that the assessments of taxes made to plaintiff in error by the State Board of Equalization were not assessments and levies of taxes upon the gross receipts of plaintiff in error on all its business begining and ending entirely within the State, and upon that proportion of the gross receipts from its business passing through, into or out of the State that the mileage within the State bore to the total mileage over which said interstate business was done; and that said assessments and levies were not in violation of paragraph 3, section 8 of Article I of the Constitution of the United States

Third. The said court erred in holding that the taxes levied, charged and collected from plaintiff in error upon the assessments so made upon that proportion of the gross receipts from its business passing through, into or out of the State that the

mileage within the State bore to the total mileage over which said interstate business was done were not taxes on the gross receipts of the plaintiff in error from its interstate business, and were not taxes on interstate commerce and burdens on such commerce, and were not taxes on the income and business of the plaintiff in error situated without the State, and that the enforcement of said taxes against plaintiff in error and the payment thereof required by the State Treasurer of said State, as provided by Section 14 of Article XIII of the Constitution of said State and Chapter 335 of the Laws of 1911 of said State, did not in fact deprive plaintiff in error of its property, to-wit, the amounts of the taxes levied upon the income of the property and business of plaintiff in error situated without said State, and that the right of plaintiff in error to continue to do business in said State was not made dependent on the payment of said taxes on or before days fixed by statute of said State.

Fourth. The said court erred in holding that the taxes so demanded by the State and paid by plaintiff in error were taxes upon the property of plaintiff in error subject to taxation in the State of California; and in not holding that said taxes were taxes upon the gross receipts of plaintiff in error derived in part from interstate commerce.

Fifth. The said court erred in holding that the action of the Legislature of said State in purporting to ascertain and determine that the property

of the plaintiff in error was of that value, which by levying thereon the rate of taxation levied upon other property and against other persons similarly situated would result in a tax upon the value of said property employed in the busines of plaintiff in error, equal in amount to a percentage of the gross receipts of plaintiff in error within said state —including a mileage proportion of the gross receipts from interstate commerce—and that the action of the State Board of Equalization of said State, in considering and resorting to said gross receipts to ascertain and determine the tax that plaintiff in error should pay upon its property, amounted to and was an assessment for the purposes of taxation of the property of plaintiff in error subject to taxation in and by said State, or that either of said acts, or both combined, amounted to an assesment of property for purposes of taxation.

Sixth. The said court erred in holding that the taxes levied, charged and collected from plaintiff in error upon the assessment so made, including a mileage proportion of the gross receipts from interstate commerce, were taxes upon the property of plaintiff in error subject to taxation in said State.

Seventh. The said court erred in not holding that Section 14 of Article XIII of the Constitution of said State and Chapter 335 of the Laws of 1911 of said State, so far as the same apply or purport to apply to the gross receipts of plaintiff in error

arising from interstate commerce, and the taxes claimed thereunder, are invalid for the reason that they constitute an unlawful interference with and burden upon interstate commerce, in violation of paragraph 3, Section 8, Article 1, of the Constitution of the United States, and deprive plaintiff in error of its property without due process of law, in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

Eighth. The said court erred in not holding that said constitutional provision and said statute, so far as the same apply or purport to apply to the gross receipts of plaintiff in error arising from interstate commerce, and the taxes claimed thereunder, are invalid for the reason that they constitute a tax upon property of plaintiff in error without the State of California in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Ninth. The said court erred in refusing to reverse the judgments of the trial court and in failing to give to plaintiff in error its rights under the Constitution of the United States as claimed by it.

Tenth. The said court erred in holding that the validity of that portion of Chapter 335, Laws of 1911, of said State, declaring a forfeiture of the right of a foreign corporation, plaintiff in error, to do business in said state if said taxes are not paid is not involved in actions to recover taxes paid.

BRIEF OF ARGUMENT.

The Questions Involved.

Plaintiff in error contends that the State has no power to tax gross receipts from interstate commerce nor power to tax the income of property situated and business done without the State, nor power to demand the payment of a tax upon such forbidden subjects as a condition upon which interstate commerce may be engaged in within the State; and contends that the tax in question is imposed upon gross receipts from interstate commerce and upon the income of property and busines without the State and that plaintiff in error's right to engage in interstate commerce within the State is made dependent upon its payment. Conceding that the State has a right to tax the property within its jurisdiction, even though such property may be employed in interstate commerce, and that a tax on property may be measured by gross receipts, plaintiff in error contends that if the State imposes a tax upon gross receipts derived from interstate commerce, calling it a tax on property, the burden of proof is on the State to sustain its right to tax the forbidden subject of such receipts from interstate commerce and that the present tax is not a property tax but one aimed so directly at such receipts as to be an unlawful burden on interstate commerce.

The defendant in error contends that the tax is not a tax upon gross receipts but a property tax imposed under legislative authority, which is alleged to have included a determination that the property of plaintiff in error is of that value, which, if subject to the rate of taxation levied upon other property and against persons similarly situated, would result in a tax upon the property equal in amount to the prescribed percentage of the gross receipts of plaintiff in error—including a mileage proportion of receipts from interstate commerce.

The Authorities.

There is no fixed rule for determining in all cases whether a tax of the nature of the one involved here is a lawful tax on property measured by gross receipts or a tax aimed so directly at gross receipts as to constitute an unlawful burden on interstate commerce. While the court has not attempted to apply any rule of general application, however, it has made perfectly plain the fundamental principles upon which a determination of the question must rest.

Since under modern conditions a large amount of property is employed in carrying on interstate commerce, the Commerce Clause should not be so applied as to confer upon this property immunity from State taxation and a reasonable latitude should be accorded the States in levying taxes on it. There is no doubt that a State is entitled to tax instrumentalities of interstate commerce within the State and that in so doing it may take into account "intangible values" accruing from their use as part of a unit system of transportation. The so-called unit system of taxation approved in *Adams Express Co. v. Ohio*, 165 U. S. 227, and other cases, need only be referred to. It is but one method of ascertaining a fair valuation of the property taxed. Gross receipts or gross earnings systems of taxation may be used as a method of arriving at the same result, but the State may not tax interstate commerce itself or the earnings

therefrom, or property situated without the State, and if under the circumstances the tax may be said to be so directly aimed at interstate earnings as to evidence an intention to levy upon them as such, the tax will be declared void as an unlawful burden upon interstate commerce. In determining this question the controlling matter is not the expressed intention of the Legislature, nor the manner in which the law is administered, but the effect of the Act. That is the vital test.

The difficulty has been in applying the foregoing principles to the particular case.

However, the expressed intention of the Legislature as well as the manner in which the law is administered may be, and should be, considered to such extent as it is or may be an indication that the gross receipts are aimed at and the *purpose of such aim*, in a particular case.

The earliest case of this nature which arose is *State Tax on Railway Gross Receipts*, 15 Wall. 284. The Pennsylvania statute there under consideration required every railroad company incorporated in the State to pay semi-annually a tax of three-fourths of 1% upon its gross receipts, the tax being applied to receipts derived in part from transportation in interstate commerce. The tax was upheld by this court on two grounds: First, that the tax was not upon transportation itself but upon the receipts therefrom after they had become commingled with the general mass of the company's property within the State and so become taxable. Second, that the tax was sustain-

able as a tax on the company's franchise, the receipts being used as a measure of value.

Three Justices dissented, holding the case irreconcilable with *State Freight Tax*, 15 Wall. 232, decided at the same term of court in which the court declared that another Pennsylvania statute imposing a tonnage tax on railroad companies based on the freight carried in both intra and interstate commerce was, so far as applied to the latter, a regulation in violation of the Commerce Clause, in which opinion it was said (p. 276):

> "The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation, she (the state) may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible."

The holding in *State Tax on Railway Gross Receipts* was not directly called into question for many years. The so-called "Granger Cases" and others relating to the power of the States to deal with interstate rates intervening.

In *Fargo v. Michigan*, 121 U. S. 230, the situation was in its essential aspects the same as that now before the court. The Michigan statute under consideration (No. 152 of the Public Acts of Michigan for 1883) provided for the taxation of fast freight and other car line companies upon the gross earnings basis, the tax to be levied upon the gross receipts earned within the limits of the State

and to be in lieu of all other taxes upon the cars from the use of which the earnings were derived. Section 1 of the Act provided that:

> "Every * * * corporation, association, car loaning company or fast freight line engaged in the business of running cars over any of the railroads of this State, * * * who are or may hereafter be engaged in the business of carrying passengers in any palace, drawing room, sleeping, chair, or other car over or upon any railroad in this State, or any part thereof, for the right of occupancy of which passengers are required to pay a sum additional to that charged upon the ordinary cars of the road * * * shall keep in such manner as shall be prescribed by the Commissioner of Railroads, a just and true account of all sums so received by them as additional charges for the occupancy of such cars *over any road or portion thereof within the limits of this State and shall* * * * each year, report to said Commissioner of Railroads, * * * *the gross amounts of such receipts as aforesaid, earned within the limits of this State*, for the year * * * preceding the date of such report." (Italic ours.)

Section 2 required corporations, etc., running fast freight lines, etc., to keep accounts and make reports as provided in Section 1 in the case of palace, drawing room, sleeping and other passenger cars. Section 3 provided for the verification of all such reports and Section 4 required the Commissioner of Railroads to make and file a computation of the tax based on the reports so made and

provided penalties for failure to report. Section 5 reads as follows:

> "Every corporation, association, * * * car loaning company, * * * or person as specified in sections one and two of this act shall on or before the first day of July in each year, pay to the State Treasurer, upon the statement of the Auditor General, an annual tax of two and one-half per cent upon their gross receipts as computed by the Commissioner of Railroads, and derived from passengers or from the loaning, renting or hiring of these cars to any railroad * * * and such taxes shall be in lieu of all other taxes upon the cars used for the purposes mentioned in sections one and two of this act."

The earnings which it was sought to tax were those of the Merchants Dispatch Transportation Company, a fast freight line organized under the laws of New York, soliciting and contracting for the transportation of freight on through bills of lading in cars owned by the company whose mileage was wholly interstate. For the use of the cars the company was paid a definite sum per mile by the railroad companies for the distance traveled over their respective lines and after the passage of the Act it filed a report showing its gross receipts of mileage divided between receipts from mileage made by cars passing through the State in transit, properly prorated, and receipts from mileage made by cars passing in or out of the State in interstate movements. No attempt was made to assess a tax on the first item and a suit

was brought to enjoin the collection of a tax on the second item.

This court, reversing the Supreme Court of Michigan, held that the tax was invalid as a burden upon interstate commerce and while recognizing that there was possibly some lack of harmony in the earlier decisions of the court, said (p. 240):

> "Still we think the more recent opinions of the court have pretty clearly established principles upon that subject which can be readily applied to most cases requiring the construction of the constitutional provision, and that these recent decisions leave no room to doubt that the statute of Michigan, as interpreted by its Supreme Court in the present case, is forbidden as a regulation of commerce among the states, the power to make which is withheld from the state."

Distinguishing *State Tax on Railway Gross Receipts*, the court definitely overruled the second ground of decision in that case as follows: (p. 243-4.)

> "The proposition that the states can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the

states or with foreign nations, the constitutional provision cannot thereby be evaded; nor can the states, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way."

The next case of importance was *Philadelphia and Southern Mail Steamship Co. v. Pennsylvania*, 122 U. S. 326. The Pennsylvania law there in question imposed a tax of a fixed percentage upon the gross receipts of every company wherever incorporated, carrying on a transportation, telegraph or express business in the State. The Steamship Company was a Pennsylvania corporation engaged in interstate and foreign commerce by sea. The specific question presented was whether the gross receipts "derived from freight and passage money between the ports of Philadelphia and Savannah and in foreign trade from New Orleans and a small amount from charterparties in the like trade," might be taxed. This court held the tax to be a regulation of and interference with interstate commerce, being levied directly upon the receipts from such commerce, saying (pp. 335-6):

"The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and

from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress. * * *

If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other."

The court in considering *State Tax on Railway Gross Receipts* expressly overruled the first ground of decision in that case, denying that the tax might be regarded as one upon the receipts after they had become a part of the general mass of personal property within the State. Consequently both of

the grounds upon which that case rested were now overruled. The court also affirmed the decision in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, in which a Pennsylvania tax on the capital stock of a New Jersey corporation engaged in the operation of a ferry between that State and Pennsylvania was declared invalid as a tax on interstate commerce, saying that the reasoning of that decision applied equally to domestic corporations.

Ratterman v. Western Union Telegraph Co., 127 U. S. 411, involved an Ohio statute taxing the receipts of telegraph companies derived partly from intrastate and partly from interstate commerce assessed in gross, and this court held the tax invalid as applied to the latter, saying (p. 424):

> "Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that so far as it was only upon commerce wholly within the State it was valid."

and following the case of *The State Freight Tax*. This decision was followed upon a similar state of facts in *Western Union Telegraph Co. v. Pennsylvania*, 128 U. S. 39.

At the same term in *LeLoup v. Mobile*, 127 U. S. 640, the court held a general license tax imposed on telegraph companies as a condition of doing business to be a tax on the business and invalid

as applied to a company doing interstate business and said (p. 648):

> "That no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

In *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472, a tax imposed on the gross receipts of telegraph companies "from business done * * * in this State" was, as applied to gross receipts from messages transmitted partly within and partly without the State, held to be unconstitutional as a regulation of interstate commerce.

The following cases, while not especially apposite on the facts, all affirm the conclusions stated in *LeLoup v. Mobile*.

Lyng v. Michigan, 135 U. S. 161.

Crutcher v. Kentucky, 141 U. S. 47.

Pacific Express Co. v. Seibert, 142 U. S. 339.

Up to this point it will be noted that (with the exception of the case of *State Tax on Railway Gross Receipts*, afterward overruled) this court held practically uniformly without qualification that receipts from interstate commerce could not be taxed by a State.

In *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217, a Maine statute was involved differing materially in form from those theretofore passed upon by the court. Under it the lands of railroad companies outside of their rights-of-way and all their buildings were taxed like other property and there was imposed upon such companies in addition, what purported to be an annual excise tax for the privilege of exercising their franchises in the State, the two kinds of taxes together being declared to be in lieu of all other taxes upon the railroads, their property or stock. The amount of the excise tax was fixed by percentages varying up to a certain limit, of the average gross receipts per mile (including both intrastate and interstate commerce) multiplied by the number of miles operated within the State, and was not in form levied upon the gross receipts but declared to be "equal to" a percentage of the gross receipts. The court found a distinction between this case and the previously decided cases and upheld the tax, apparently believing that the entire scheme of the statute justified the conclusion that the Legislature was attempting in good faith to reach the value of the property per mile and not tax the receipts as such, saying (p. 229):

> "There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, * * * simply the means of ascertaining the value of the privilege conferred * * *."

The "privilege" was a charter granted by the State of Maine to the corporation which built the road and leased it to the operating company, a Canadian corporation. It was expressly stated that this decision did not conflict with *Philadelphia & Southern Steamship Co. v. Pennsylvania*, and that the correctness of that case was not questioned, qualified or impaired in any way. Here we first find the suggestion that gross receipts, including those derived from interstate commerce, may serve as a measure of value. There was a strong dissenting opinion, four Justices believing the case indistinguishable from the case referred to and other recent decisions of the Court and declaring (p. 235):

> "We think that the present decision is a departure from the line of these decisions. The tax it is true is called a tax on a franchise. It is so-called but what is it in fact? It is a tax on the receipts of the Company derived from international transportation."

In *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, a Mississippi statute imposing a privilege tax on various corporations, including telegraph companies, graduated according to the amount and value of the property measured by miles and declared to be in lieu of other State, county and municipal taxes, and shown to impose a less tax than would have been collected under an ad valorem tax, was sustained. The court, after declaring the general rules laid down in previous cases as to interference with interstate commerce by the

exercise of the taxing power of the State said (pp. 696-7):

> "But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be levied directly thereon), *and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.* * * *
>
> Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." (Italics ours.)

The court asserted the tax to be substantially a tax on property and not one imposed for the priv-

ilege of doing interstate business. There was a dissent by two Justices in this case who were of the opinion that the act fairly construed imposed a tax for the privilege of doing interstate business within Mississippi and that its character was not affected by the relation between the amount thereof and the sum the Company would have had to pay under an ad valorem tax.

The decision in Maine v. Grand Trunk Railway Co. was followed in *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379.

In *Fargo v. Hart*, 193 U. S. 490, the tax involved was an ad valorem assessment of the property of an Express Company, the property being partly within and partly without the State, a part of that without being in the form of investments not used in its business. The Indiana authorities sought to treat the whole busines as a unit, assessing the company on a proportion of the total value of all this property determined by the ratio of the mileage in Indiana to that everywhere. This Court declared that the State took into account by this method property it had no right to consider, using the unit rule as a cloak to tax personal property outside the State's limits and which did not properly constitute a part of the unit in question. The Court said (pp. 499-500, 502):

> "It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined

to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense. * * *

The difference is not a mere difference in valuation, it is a difference in principle, and in our opinion the principle adopted by the board was wrong. It involved an attempt to tax property beyond the jurisdiction of the State, and to throw an unconstitutional burden on commerce among the States."

In *Galveston, Harrisburg & San Antonio Railway Co. v. Texas*, 210 U. S. 217, suit was brought by the State in its own courts to recover taxes and penalties under an act imposing upon railroad companies a tax equal to one percent of their gross receipts (if their lines lay wholly within the State). The line of the railroad company against which suit was brought was located wholly within the State, but connected with outside lines and a portion of its receipts was derived from the carriage of passengers and freight coming from or moving to outside destinations. The question as to whether this part of the receipts should be governed by the *Philadelphia Steamship Company Case* or by *Maine v. Grand Trunk Railway Company* was fairly presented. The majority of this court, the

opinion being by Mr. Justice Holmes, held the tax void. Evidently the court felt a real difficulty in attempting to reconcile the two previous cases, but there was no modification of either decision. As to the earlier case, it was said (page 224):

> "In *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law."

As to the later case (page 226):

> "In *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 'an annual excise tax for the privilege of exercising its franchise,' was levied upon every one operating a railroad in the State, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the State when the road extended outside. This seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Company Case*. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed,

and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax."

The opinion expresses fully for the first time the idea that a practical rather than a logical distinction must be sought for (page 225):

"It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."

And after quoting from *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, (page 227):

"It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A prac-

tical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. * * *

We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself."

The dissenting opinion of four justices did not differ from the majority opinion as to the principles declared, but held as a matter of construction that the Texas statute did not evidence an intent to levy on the interstate receipts as such.

The *Galveston Case* marks a turning point. From that time the court applies constantly in dealing with this class of cases a practical test.

In *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, and *Pullman Company v. Kansas*, 216 U.

S. 56, the question was whether a Kansas statute requiring foreign corporations as a condition of the right to do local business in the State to pay a tax of given percentages of their authorized capital was valid. The Court in both cases held the act void. First because the law operated as a burden on interstate commerce, second, because it operated as a tax on property without the State. In the opinion in the first, the Court stated the point in the Galveston case as follows (page 24):

> "The contention by the railroad company was that the tax was a burden on interstate commerce, and invalid, so far as it was *based on* or was measured by receipts derived from interstate transportation. That view was sustained."

And in answering to a disclaimer of any purpose to burden interstate commerce (page 27):

> "But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted either directly or by its necessary operation burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business."

In *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, decided at the same term of court, a

statute of Arkansas very similar to the Kansas one involved in the last two cases, was held invalid on the same ground. The Court said that previous legislation on the same subject was immaterial; that the statute must stand or fall by itself and that (page 162):

> "If a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the state Legislature may not have intended to enact an invalid statute."

In *Oklahoma v. Wells Fargo & Co.*, 223 U. S. 298, the tax involved required certain corporations, including express companies, to pay a gross revenue tax, in addition to an advalorem tax upon property and assets, equal to given percentages of the corporation's gross receipts, "if such * * * corporation operates partly within and partly without the State it shall pay taxes equal to such proportion of said percentum of its receipts as the portion of its business done within the State bears to the whole of its business," with a proviso for fixing a different proportion if it more fairly "represents the proportion which the gross receipts of such companies for any year within the State bear to their total gross receipts." The receipts of the company in question were chiefly derived from interstate commerce and from investments without the State. The Court said that if the tax was a

property tax, it was bad as taking into account these outside investments, the rule laid down in *Fargo v. Hart* applying equally to a property tax measured by gross receipts as to a property tax measured by mileage, but that there was no warrant for calling it a property tax, for it was within the decision in the *Galveston Case* a tax levied directly upon the interstate receipts (page 302):

> "It is not simply a tax on all gross receipts within the State, which possibly might be read as intended to reach such receipts as it could, even if less than all, * * * it is a tax on a proportion of total gross receipts a considerable part of which, as we have explained, the State has no right to tax."

In construing the statute the Court said (page 301):

> "It would be difficult to apply to a tax levied in these days the explanation of *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, given in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 226, * * * and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items."

We think it may be asserted without question that the *Maine v. Grand Trunk Ry. Co.* case has been so modified by later decisions of this Court as to amount to a reversal, or at any rate to an abandonment of the doctrine on which that case was decided with respect to interstate commerce.

Decided at the same time was *U. S. Express Co. v. Minnesota*, 223 U. S. 335. The Express Company which was engaged in local and interstate business over railroads running into and through the State was required by statute to file reports showing its entire receipts for business done within the State "including its proportion of gross receipts for business done in the State by such company in connection with other companies" and after the deduction of certain sums paid to the railroads there was assessed upon the balance of the receipts a tax of 6%, which was declared to be "in lieu of all taxes upon its property." The State sued for the tax so imposed on certain items of receipts from business done between points in Minnesota, one class of these receipts being derived from transportation between points both of which were within the State but passing out of the State enroute, the other class being derived from "interstate transfer business" so-called, that is from shipments in interstate commerce passing into, out of, or through the State (page 341):

> "As to all of which * * * shipments * * * the defendant received said shipments at a point in the State of Minnesota and forwarded them over its lines to a second point within the State of Minnesota, the transportation while in the hands of the defendant being performed wholly within the State of Minnesota. The transportation in connection with such shipments outside of the State of Minnesota was performed by connecting companies other than this defendant."

Later in the opinion, on the same page (341), and in connection with this same subject, the Court added:

> "Taxes are not claimed or collected upon shipments of express matter in the classes named where the same express company performs the transportation service both within and without the State of Minnesota."

These shipments moved upon through waybills and bills of lading and consisted of a single transportation transaction extending from delivery by the shipper to delivery to the consignee.

With respect to the first class of receipts mentioned, this court on the authority of *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192; held that the tax was not an interference with interstate commerce. The receipts had been apportioned on a mileage basis so that the State was only attempting to tax a proportion based on Minnesota mileage. See also the later case of *Ewing v. City of Leavenworth*, 226 U. S. 464.

With respect to the second class of receipts mentioned, this court while noting that such earnings were within the operation of the law, were earnings from interstate commerce, and that the general rule, as laid down in the *Galveston Case*, the *Philadelphia Steamship case*, and *Fargo v. Michigan*, condemns a tax upon such commerce as an interference therewith, nevertheless held the case distinguishable from those decisions and declared the tax valid. The Court said (page 343):

"While we have no disposition to detract from the authority of these decisions, this Court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the State by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce."

Then after referring to *Maine v. Grand Trunk Railway Company*, and other cases (page 344-348):

"The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in *Galveston, Harrisburg & San Antonio Ry Co. v. Texas*, 210 U. S. supra, wherein the possible differences between the decisions in *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. supra and *Maine v. Grand Trunk Ry. Co.*, 142 U. S. supra were commented upon and explained. * * *

In that case the statute of Texas was condemned, because it appeared to the court to be an attempt to reach the receipts from interstate commerce by a tax of one per cent., or what was equal to the same thing, on gross receipts arising from such commerce, when it appeared from the judgment of the state court and the argument on behalf of the State that

another tax on the property had already been levied, covering its full value as a going concern. The tax under consideration was held to be merely an effort to reach the gross receipts, not disguised by the name of an occupation tax or in any way helped by the words 'equal to.'

Upon like reasoning the statute of Oklahoma was condemned in the case of *Oklahoma v. Wells Fargo & Co.*, decided today, ante, p. 298. * * *

The tax in the present case is not like those held invalid in the *Galveston Case and the Oklahoma Case*, being in addition to other state taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation, seeking to reach the value of the property of such companies in the State, measured by the receipts from business done within the State. The statute was not aimed exclusively at the avails of interstate commerce *(Philadelphia Steamship Co. v. Pennsylvania, supra)* but, as in the *Maine Case*, was an attempt to measure the amount of tax within the admitted power of the State by income derived; in part, from the conduct of interstate commerce."

This decision it will be seen is a direct application of the reasoning in the *Galveston Case*. That reasoning applied in the *Oklahoma Case* condemned the statute involved, applied in this case upheld the tax, although it clearly appears that the case was regarded as coming close to the line.

Study of the opinion in the Minnesota case shows clearly the distinction in the facts between it and the *Philadelphia Steamship Case* and *Fargo v. Michigan*, namely, as stated by the court (223 U. S. 241) *that no tax was imposed on shipments where the same company performed the transportation partly in Minnesota and partly in another state or states.*

St. Louis Southwestern Railway Company v. State of Arkansas, 235 U. S. 350. An Arkansas statute imposed an annual franchise tax on corporations doing busines in the State, both domestic and foreign, its amount being dependent upon the determination by the Tax Commission of the proportion which the authorized capital stock represented by property and business in the State bore to the entire authorized capital stock. Failure to pay the tax was declared to work a forfeiture of the corporation's right to do business in Arkansas. Another statute declared that the franchise "other than the right to be a corporation" was property to be considered in the general assessment of railroad property for purposes of taxation. The Railway Company, a Missouri corporation, made the report required by the first statute under protest and was sued for the unpaid taxes. This court declared that the statute simply imposed a tax on the privilege of exercising corporate powers in the State based on property within the State, that privilege being excepted from the general assessment of the company's property. The court in construing the act said (page 363):

> "By this we understand that the franchise of a foreign corporation that is intended to be taxed is that which relates solely to intra-state business."

and further (page 365):

> "We have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within the State."

The Court then went on to state that a more serious question was presented by the forfeiture clause of the act (page 368):

> "If this must needs be construed to mean that for nonpayment of the franchise tax a foreign railroad corporation engaged in business as a common carrier of intra-state and interstate commerce is to forefeit its rights to do business in the State, not only with respect to intra-state but also with respect to interstate commerce, the effect would be to impose a condition upon its right to transact interstate commerce, and the act would be invalid as amounting in effect to a regulation of that commerce; * * * This result would follow from the principles laid down in *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 554; *LeLoup v. Port of Mobile*, 127 U. S. 640, 644, 647; *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472, 477; *Allen v. Pullman Co.*, 191 U. S. 171, 179; and many other cases."

As the state court had not construed the section as calling for the forfeiture of the right to do interstate busines, the court said it would presume, until the state court decided otherwise, that the forfeiture clause would be construed as requiring the forfeiture of the right to do intrastate business only. (235 U. S. 369):

> "At present, therefore, we have merely to consider whether § 20 so clearly requires a forfeiture of the interstate franchise for nonpayment of the tax in question that it is not reasonable to anticipate that the state court will put another construction upon it."

The conclusion reached was that the statute did not necessarily call for the forfeiture in question. Such cases as:

Baltic Mining Co. v. Massachusetts, 231 U. S 68;

Ohio Tax Cases, 232 U. S. 576;

Kansas City etc. v. Kansas, 240 U. S. 227;

Kansas City, etc. R. R. Co. v. Stiles, 242 U. S. 111.

are more or less governed by the same considerations which controlled in the *St. Louis Southwestern Case*, and do not materially affect the situation.

In *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, this court had before it another Minnesota statute imposing upon carline companies a tax of a stated per cent of their gross earnings in lieu of other taxes on property employed in operation of

the car lines. The court stating again the general rule laid down in the *Galveston case* and kindred decisions, referred to the decisions of the state court to the effect that the tax imposed was one on property, not on gross earnings, and the same view apparently taken by the Legislature, and said that the law was similar to that involved in the *United States Express Case*, and must therefore be regarded as valid. The court said (pages 455-456):

> "Because the usual tax rate, if applied to the cash value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax on the property. But the contention proceeds on an erroneous assumption. The State is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits, and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately—enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value."

Union Tank Line Co. v. Wright, 249 U. S. 275. A statute of Georgia required from equipment companies a return showing the total mileage over which their cars owned were operated and the entire value of their cars and other personal prop-

erty, and imposed upon them a tax based on the proportion which the track mileage in the state bore to the total track mileage over which operations were carried on. The Tank Line, a New Jersey corporation, had no office in the State and the movements of its cars in the State were wholly in interstate commerce. This court declared such a tax unconstitutional. It said that while movables regularly and habitually employed, in the State, might be taxed at their fair value, as other property, although devoted to interstate commerce and that such valuation might include "intangible values" due to the use of the property as a part of a unit, yet (page 283):

> "In the present case the Comptroller General made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a State cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. * * *
>
> We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

Referring to *Fargo v. Hart,* the court said (page 286):

> "We condemned an assessment ostensibly proportioned to mileage where property without the State and unnecessary to the Express Company's actual business had been included; and we pointed out that under no formula can a State tax things wholly beyond its jurisdiction."

There was a dissenting opinion of three justices who felt that the case was similar to *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, and was in harmony with the *Cudahy Packing Company Case*, the majority of the court holding that the case fell on the other side of the line and that the tax was unconstitutional as taxing property outside the State and as a burden on interstate commerce.

The *Union Tank Line Case* was followed in *Wallace v. Hines*, 253 U. S. 66.

THE TAX IS AIMED SO DIRECTLY AT GROSS RECEIPTS AS TO CONSTITUTE AN UNLAWFUL BURDEN ON INTERSTATE COMMERCE AND A TAX UPON THE INCOME OF PROPERTY AND BUSINESS WITHOUT THE STATE.

The question now comes to this: Do the facts in the present case bring it within the class of cases represented by *Fargo v. Michigan*, the *Philadelphia Steamship Company case*, and the *Galveston case;* or do they bring it within that other class of cases represented by *Maine v. Grand Trunk Railway*, the *United States Express Company case* and the *Cudahy Packing Company case?*

(a) *The Record in the Case.*

The record in this case shows that the Board of Equalization of California assessed a tax not upon the property of plaintiff in error in the State, but upon its gross receipts.

This property consisted for the most part of sleeping and other cars owned by plaintiff in error and used upon railroads within the State and a proportion of those used partly within and partly without the State, under contracts with the railroad companies. The only other property in the State was materials and supplies for repairs to the cars and a portion of a repair plant used for so-called "operating purposes," the balance of the plant being assessed by the local assessor as "non-operating property."

Defendant in error claims, and the court below found, that the Board of Equalization levied a tax upon the franchise of and upon this property of plaintiff in error, and that their value as a unit for purposes of taxation was ascertained and determined by the Legislature to be of that value, which, by levying thereon the rate of taxation levied upon other property and against others similarly situated, would result in a tax upon the value of such property equal to a certain percentage of the gross receipts of plaintiff in error, including a mileage proportion of receipts from interstate commerce.

There were introduced in evidence in the cases in the trial court (saving the two cases heard on demurrer to the complaint Nos. 469 and 470) cer-

tified copies of various proceedings of the State Board of Equalization with regard to the tax in question. The evidence was substantially the same in each case. *For the sake of clarity, we will refer here specifically to the record in No. 464, the suit brought for the recovery of the taxes paid for the year* 1911.

Plaintiff's Exhibit 2 (Transcript page 25) is the minutes of the Board for its meeting of Saturday, May 20, 1911. This states that the Board on that day considered and determined that certain "car companies," including the Pullman Company, should be "assessed by this Board for the gross receipts of their rolling stock."

Plaintiff's Exhibit 3 (Transcript page 26) is a circular of the Board to the local assessing officers, dated the same day, stating that the Board had considered the matter of the assessment of certain "sleeping car, dining car, drawing room car and palace car companies," for the assessment year of 1911, including the Pullman Company, and would assess said companies "for their rolling stock and franchises" and that the assessment exempted the "rolling stock and franchises" from ordinary local taxation, with certain exceptions.

Plaintiff's Exhibit 4 (Transcript pages 28-29) is the "Record of Assessments for State Taxes for the Year 1911—Assessments of Quasi Public Corporations for Property Used Exclusively in the Operation of their Business in the State of California," and shows that the Pullman Company was assessed according to the record,

"Gross Receipts to December 31, 1910,—$1,905,302.97."

and

"Tax Thereon under Section 14 of Article XIII, Constitution,—$57,159.08."

The proceedings of the Board were substantially the same every year. In some years subsequent to 1911 a description of the real estate owned by plaintiff in error and used as operative property was included in the assessment record, and it was also recited that the assessment

"shall also include and does hereby include all other operative property, real and personal, as is set forth and contained in the report of said company on file with the State Board of Equalization, which report is hereby referred to and made a part of this assessment."

[For example see No. 466, Plaintiff's Exhibit 3, (Transcript page 28)].

It does not seem that this additional recital adds to or subtracts from the effect of the whole proceeding by which the tax was imposed,—that is the recital in the legislative act and what the Board actually did.

The Act recited, in accordance with the Constitution, that the tax should "be equal to the percentages hereinafter fixed upon the gross receipts from operation." This court held in the Galveston case that the imposition of a tax "equal to" fixed percentages upon gross receipts does not avoid the effect of taxing the gross receipts. The

Board in its assessment record stated the gross receipts to be so many dollars, which was assessed, and

> "*Tax Thereon* under Section 14, Article XIII, Constitution,"—so many dollars.

It seems manifest that the gross receipts were taxed.

The Board of Equalization, after notifying plaintiff in error that its gross receipts had been assessed, made an assessment of the property of plaintiff in error in the State on an ad valorem basis for Panama-Pacific Exposition and bond refunding State taxes. Plaintiff's Exhibit 6 (Transcript pages 33-35) is the record of this assessment for the year 1911, which was in the sum of $2,995,760. This assessment was for a purpose entirely foreign to the gross receipts tax, but was upon all the property of the Company subject, or claimed by the State to be subject, to tax by the State, and is the same property on which the State now contends the gross receipts tax was assessed; it was made under subdivision (e) of Section 14 of Article XIII of the Constitution and Section 33, Chapter 335, Laws of 1911, wherein it was made the duty of the State Board of Equalization to *ascertain the value* of the property of plaintiff in error in the State subject to taxation and assess said property according to its value "to meet any deficiency in the State revenue," the classes of property enumerated in the Act (that is, belonging to companies subject to the gross receipts tax) not being excluded from such an ad valorem as-

sessment. *This is the only ascertainment of value ever made by the Board, and has no connection with the gross receipts tax and was made after the gross receipts tax had been assessed.*

The record fails to show any valuation of the property of the plaintiff in error which was used as a basis for the ascertainment of the amount of the gross receipts tax. The State merely taxes the receipts of plaintiff in error from both interstate and intrastate commerce, calling the tax a property tax and declaring that the property shall be taken to be of that value that would produce that tax. The legislation and the assessment record show that the end sought was a tax of a percentage of gross receipts, regardless of what the property was or of its value as physical property or combined with all other taxable elements of value.

(b) *The history of the tax law.*

The history of the constitutional and statutory provisions under which this gross receipts tax is assessed is of more than ordinary importance to enable the Court to determine the nature of the tax, from the view: First, what the Tax Commission recommended to the Legislature should be taxed, and why, and what the Legislature must have intended to tax, having before it the recommendations of the Tax Commission and its reasons; and

Second, what is actually accomplished by the enforcement of the constitutional and statutory provisions. It will plainly appear from what we pre-

sent in this history that the purpose *was to tax earnings and not property—because a tax on earnings would be more* than a tax on the property.

The Court in the *Galveston case*, on page 227, said:

> "When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn, by taking the whole scheme of taxation into account. That must be done by this court as best it can."

That the real object of the California Legislature was to enact a law that would impose a tax upon gross receipts derived from interstate as well as local business, and not to enact a law imposing a tax on property is apparent when we have recourse to the history of the law. The scheme of taxation was devised to furnish a means whereby the State might obtain a greater tax than could be obtained by taxing all of the property of corporations subject to the law, whether used in interstate or intrastate commerce.

That the court, in construing legislation, may consider official public documents and published reports made pursuant to law, such as reports of legislative committees, especially committees appointed with a view of determining the scope of statutes passed pursuant to such reports, and that the court does when necessary consider these for

information concerning such legislation is well settled. See:

Binns v. United States, 194 U. S. 495.
Johnson v. Southern Pacific Co., 196 U. S. 19.
Blair v. Chicago, 201 U. S. 470.
Central Pacific v. Evans, 111 Fed. 71.
Mosle v. Bidwell, 130 Fed. 334.
Wadsworth v. Boyeson, 148 Fed. 779.
United States v. C. & N. W. Ry. Co., 157 Fed. 616.

Chapter 335, Laws 1911, the gross receipts tax law in question here, was passed following the report of a special commission constituted under an act of March 20, 1905, which provided for the appointment of a joint commission from both houses of the Legislature to recommend a plan for the revision of the State system of revenue and taxation. This commission made an exhaustive report to the Legislature, and the Legislature, basing its action on that report, passed the gross receipts tax law which has been several times amended, though all of its fundamental features have been retained. That report shows that the method of assessment and taxation suggested by the committee was to reach, under the guise of a property tax, the gross receipts of the companies included in the plan from both interstate and intrastate business, rather than to impose a tax upon property subject to taxation upon an ascertainment of its value. A constitutional amendment, prepared and recommend-

ed for adoption by this commission, was submitted by the Legislature to the people in 1907 and was defeated; but in 1909 another substantially similar amendment was submitted and adopted, and is now Section 14 of Article XIII of the Constitution already referred to. The gross receipts tax law of 1911 was then passed to carry the constitutional amendment into effect.

Chapter 3 of the report in question, commencing on page 91, is entitled "Gross Earnings Tax in Theory and Practice," and under a smaller heading immediately following—"Gross Earnings Taxes Recommended"—it is said:

> "The Commission recommends that the taxes to be levied on public service corporations shall be in proportion to gross earnings."

On page 92, under the heading "Practical Advantage of a Gross Earnings Tax" it is stated that gross earnings taxes "follow the capacity of the taxed subject to pay." And again on page 155 the same idea appears, where it is said that one advantage is "close adjustment to the ability of the corporation to pay." On page 159 it is said:

> "Steadiness of growth in revenue is another advantage. The revenue derived from the gross earnings tax will grow with the growth of the community and will in the long run keep pace therewith. *In this respect it affords a decided advantage over the property tax.*" (Italics ours.)

On pages 171 and following, the commission illustrates the application of different plans for

taxing gross earnings, showing that as the plan of taxation is varied, the tax is increased, although the property and its value would be the same under any plan; that is, by merely providing in a legislative enactment for one plan, the measure of the value of the property is so fixed as to tax more earnings than under another plan. The commission said (p. 171 *et seq.*):

> "The difference between the two methods may be simply, although very crudely, illustrated by an imaginary railroad traversing two states only. In one state, which we will call 'A,' the road does a large local traffic of, say $10,000,000 per annum; in the other state, 'B,' it has a small local traffic, say $2,000,000 per annum. The interstate traffic, we will assume, for the sake of simplicity, runs mainly to and from a metropolis on the extreme border of 'A,' clear across 'A' and 'B,' to and from a city on the farther boundary of 'B.' The mileage in 'A' is 500, in 'B' is 400. The total through traffic is $15,000,000. By the Maine plan, state 'A' would tax five-ninths of $27,000,000, or $15,000,000. By the Minnesota plan, it would tax $10,000,000, the intrastate traffic, plus five-ninths of $15,000,000, or about $8,333,000 in all, $18,333,000. That is, in the one case state 'A' would be giving its neighbor 'B' a share, as it were, in the revenues derived from its own large local traffic. In the other case it would be keeping all this for itself. The United States courts, being interested in the protection of *interstate commerce* only, would not interfere in either case, although if state 'B' in our illustration undertook to apply the Maine method, it would ob-

viously be taxing property or earnings outside of its boundaries. If both states applied the same method, obviously no objectionable double taxation would arise. But if state 'A' applied the Minnesota method and state 'B' the Maine method, the railroad would have ground for objections, as being doubly taxed on a large part of its earnings. Clearly, the most equitable system, if universally applied, is the Minnesota system. It does not undertake to get taxes or traffic outside its own bounds."

As we shall point out later, what the commission terms the "Minnesota plan" is in fact not the plan referred to at all, and does not impose a tax such as was involved in the *United States Express* and *Cudahy Packing Company* cases. The commission recommended and the Legislature adopted the plan *calculated to realize the largest possible tax*. It will be noted that in this discussion the commission does not once mention the property or its value—*earnings only are referred to:* the sole subject is "Earnings"; and the commission says, in its illustrations, that: By one plan of taxing the gross earnings state "A" would tax $15,000,000 of earnings; by the other plan it would tax $18,333,000. It ignores the fact that *the property would be the same under either plan; its value the same and the traffic and revenue the same, but by merely providing in a legislative enactment the more fruitful of two plans, the pretended measure of the value of the property is so fixed as to tax $3,333,000 more of earnings than had the other*

plan been been adopted. This shows the fallacy of the claim of the state that the provisions of the act of 1911 were merely to create a measure of the value of the property. It will be noted, however, that the commission recommended and the Legislature adopted the plan that *produced the greater revenue.*

The report of the State Board of Equalization to the Governor for 1915-1916, on page 140, quotes and adopts a paragraph from the report of the State Comptroller for 1912 with reference to State taxes.

> "The taxes on the public utilities are based on gross receipts; those of banks on the stock, on insurance companies on the premiums, and on franchises they are ad valorem—*the last being the only tax involving a valuation or assessment.*"

A new commission appointed under Chapter 194, Laws of 1915, to investigate and report to the Legislature in matters concerning taxation, in its report on page 9, says regarding the gross receipts tax amendment to the Constitution:

> "With the original rates, it failed as revenue producer, however, and would have resulted in financial paralysis for the State had it not been for the fact that the Legislature responded to Governor Johnson's recommendation by increasing the rates upon the gross earnings of corporations, first in the session of 1913 and again in the session of 1915."

In other words, the necessity for more state revenue increased the value of corporate property

33 1/3 per cent. (3 per cent. increased to 4 per cent. on gross earnings), according to legislative determination, by providing that the property should be of the value that at the rate levied on other property would provide a tax 33 1/3 per cent. higher and thus yield that much more in state revenue because *this system would otherwise have failed as a revenue producer. Is that taxing the property by "reference thereto?" Is the "ascertainment of the amount made dependent in fact on the value of the property?"*

The facts regarding what was done refute completely the claim set up by the defendant in his answer and found by the court that the property was taxed at all. *It was the gross receipts and gross receipts only.*

The tax purported in the legislative enactment to be a tax on property, but it seems plain that a characterization of it as a property tax is artificial and arbitrary, and does not reflect its operation and effect as enforced. Every circumstance, beginning with the report of the commission appointed in 1905, every utterance of the Legislature, State officials and commissions having to do with the matter either by way of making assessments or reporting on the operation and effect of the law and seeking to justify the gross receipts tax as the equivalent of a tax on property absolutely contradicts the idea that the gross receipts measure of the tax was selected, (to adopt the language of this Court in *Kansas City, etc., Ry. Co. v. Kansas*, 240 U. S. 227), as a "matter of con-

venience in computation," but on the contrary leads to the conclusion that the effort was "made to reach subjects withdrawn from taxing authority."

(c) *No reference was made to the value of the property in ascertaining the tax.*

The power of the State with respect to the taxation of the property of a foreign corporation engaged in interstate commerce and whose property is used partly within and partly without the State seeking to impose the tax, is strictly limited to the property within the State, upon whatever basis the amount of the tax is determined, and if determined by measuring the property either by its use in interstate commerce, or by the fruits or receipts of its use, either wholly or partly in interstate commerce, the State is still restricted to taxation of the property within the State; but it is a cardinal principle declared by this Court that the *ascertainment of the amount must be dependent in fact upon the value of the property situated within the State.*

The principles governing this subject as laid down by this Court in *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, have never been modified, nor has their correctness been questioned.

The opening paragraph of the opinion of Mr. Chief Justice Fuller so completely and accurately states the settled rule in this Court, that for convenience of the Court in comparing the statute of

California and its history and the results of the enforcement thereof, with that rule, we quote the paragraph in full, and have ourselves italicized certain phrases:

> "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, *if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.* The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment." (Italics ours.)

The tax in that case was sustained for the reason, appearing in the decision of the Supreme

Court of the State of Mississippi which was quoted in the opinion of this Court on pages 697-8, as follows:

> "It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, state, county, municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single *ad valorem* tax."

And this Court added (p. 698):

> "The act in prescribing the ascertainment of the charge as to telegraph companies operating less than one thousand miles of wire, was directed to reach a reasonable commutation of the amount which the company would be compelled to pay if the taxation were *ad valorem*. The taxation was neither arbitrary nor discriminating, nor, so far as we are advised, was payment made a condition precedent to doing business, but collection was enforceable by suit and the remedies pertaining thereto, and not otherwise."

And again the tax must amount

> "to no more than the ordinary tax upon property or a just equivalent therefor, *ascertained by reference thereto*."

These principles have been quoted, cited and referred to by this Court many times since the decision in the *Postal Telegraph case*, and in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, on pages 26-7, this court said:

> "We are aware of no decision by this court holding that a State may, by any device or in any way, whether by a license tax, in the form of a 'fee' or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent *in fact* on the value of its property *situated within the State*.' *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 696."

We have already shown that there was no valuation of the property of plaintiff in error by the Board of Equalization as a basis for the ascertainment of the tax. There is claimed to have been a legislative determination that the property was of that value necessary to produce a tax equal to the gross receipts tax; in other words, a determination of the amount of the tax—*not* an ascertainment in any sense of the word of property or its value, but a determination that the value of the property was to be an amount which would be necessary to raise a tax equal to the tax imposed by an arbitrary percentage of 3 per cent. on gross earnings in one year, and 4 per cent. in the next year; the increase from 3 per cent. to 4 per cent. was solely because the State needed more revenue to save its tax sys-

tem from failure, and not because there was any increase in the property or its value.

That the taxing authorities of the State of California and the commission having to do with taxation have realized the situation in this respect is clear from the attempts which have been made to give to the tax at least the appearance of having been determined on some other basis than that of arbitrary action.

(d) *The theoretical method alleged to have been adopted by the Tax Commission for determining whether the gross receipts tax is equivalent to an ad valorem tax is fallacious and misleading.*

The court below, in its opinion, refers to what it terms "the method of fixing the rate or percentage * * * used in determining the tax," stating that

> "The Tax Commission, in its report of 1906 to the Legislature, furnished the proper rate of taxation based on the gross receipts, in order to properly tax the property of the various corporations." (Transcript No. 464, page 56).

and quotes at length from that report. The commission stated that it had devised a method for determining whether the burden of the gross earnings tax was in any case the equivalent of a tax levied under the ad valorem plan, to-wit, to determine what percentage of grass earnings is net, to determine what rate of interest would constitute a fair return to investors, and divide the percent-

age of net earnings by the rate of interest and multiply the result by the given tax rate on the property. This report was referred to by the counsel for the State in the Court below in an endeavor to show that the State system of taxation was based in fact as well as name upon the value of the property of the plaintiff in error in the state.

There is no evidence that this highly theoretical formula was ever actually used in determining the tax imposed upon plaintiff in error, either by the Legislature or by the Board of Equalization, but, as an *afterthought* the State resorts to this theoretical method when the law, the tax and the method which *was* used, are attacked. As has been shown, the increase of taxation made in 1913 was based only on an *urgent need of more revenue* for State purposes. Furthermore, this theoretical method, even had it been used, would have been wholly arbitrary.

Given the facts represented by two of the symbols used in the formula prescribed,—the percentage of gross revenue which is net, and the average rate of taxation on property in California, which are both known to the State,—it follows that by the arbitrary application of the factors represented by the other two symbols of the formula, a valuation can be mechanically reached which, at the average rate of taxation, would produce a constructive tax of the exact amount which it might be desired to impose upon gross revenue at a percentage rate selected for that purpose, and wholly irrespective of the actual value of the property.

By transposing the formula a rate for capitalization may be computed so that, after having selected an arbitrary percentage rate to impose upon gross revenue, a fictitious value of the property may be forced, so that a constructive tax at the average rate of taxation on property would produce the exact amount designed to be raised by taxing the gross revenue at a percentage arbitrarily fixed thereon.

This is the identical formula referred to in the report of the California Tax Commission of 1906, which is quoted from in the opinion of the court below (Transcript No. 464, pages 56-57), where the Commission said:

> "Thus, for example, if we wish to impose, in the form of a gross earnings tax, a burden which shall be the equivalent of a tax of 1½% on the property, then in the case of a railroad, taking the figures assessed above, we divide 36 by 6 or 8, whichever shall be determined upon as a fair rate at which to capitalize railroad earnings, and multiply the result by 1½, obtaining, at 6%, 9% as an equivalent rate on gross earnings, or at 8% as a basis of capitalization, 6¾%. If the tax rate on property or capital were fixed at 1%, the above rates would become 6% and 4½%."

The Tax Commission might well have added:

> "Or, in order to determine the rate of capitalization with which to divide the percentage of net earnings to arrive at an assumed valuation which, at the average property tax rate, will produce a tax equivalent to a tax levied

on gross earnings at any rate we may select, we have simply to multiply the percentage of net earnings by the average property rate and divide the product by whatever rate we wish to impose upon the gross earnings. Thus, for example, if we wish to impose in the form of a gross earnings tax any burden which we desire the corporation to bear, and make that tax appear to be the equivalent of a tax of 1½% on the property, we multiply 36 by 1½ and divide the product by whatever rate we may select, and the quotient will be what we can assume to be a fair rate at which to capitalize earnings in order to produce a valuation which in turn will produce the amount of tax we desire to exact from the corporation."

That this actually results from the application of the formula under discussion is illustrated by the attached tabulated statement, Table I.

(e)	(f)	(g)	(h)
erage California ad valorem x rate 1911. n full actual perty values.)	Rate of capitalization of net revenue necessary to produce tax in column (e).	Net revenue ($284,037) capitalized at rate shown in column (f).	(g) times (e) equals tax shown in col. (c).
.011386	5.52221 %	*$5,148,427.89	*$58,619.99
do	4.1416585%	6,864,568.87	78,159.98
do	1.656663 %	17,161,426.31	195,399.99

cript page 60) only by the extent to which the fraction is carried

TABL

(a)	(b)	(c)	(d)
Gross Receipts Tax Rate.	Gross Receipts 1911.	Resulting Tax.	Ratio of net receipts to gross receipts—1911. (Net receipts, $284,037).
3%	$1,953,999.60	*$58,619.99	14.55%
4%	do	78,159.98	do
10%	do	195,399.96	do

* These amounts vary from those shown in the record (Tr
out.

This shows the actual gross receipts for 1911, $1,953,999.60, as reported to the State Board of Equalization and on which a tax of 3% was imposed in 1912, producing a tax of $58,619.99 (Transcript No. 464, page 60). A rate of capitalization ascertained according to the formula and applied to the percentage of gross receipts which was net in that year, as found and stated by the State Board of Equalization (14.55%), produces a property valuation of $5,148,426.13 (Transcript No. 464, page 60), and a tax of exactly the same amount as the tax of 3% upon the gross earnings. The fact that the 3% rate was fixed by the Legislature before the company's statement of gross receipts had even been filed with the Tax Commission is conclusive that the formula was "devised" by the Commission (Transcript No. 464, page 56) as a method by which a valuation of property could *subsequently be computed to fit the amount of the gross receipts tax*, and not a method of providing for a gross receipts tax which should be the equivalent of a tax on property based upon an ascertainment of its value and the application of the rate of taxation applied to property assessed and taxed under the ad valorem system. In other words, an effort was made to produce theoretically a property tax which could then be claimed to be the equivalent of any gross receipts tax which might at any previous time have been imposed by statute.

The tabulated statement also shows, for further illustration of this, a similar result if a 4% tax

should be computed upon the same amount of gross receipts, producing a tax of $78,159.98, and by the formula a theoretical valuation of $6,864,568, which at the average property tax rate produces a tax of exactly the same amount as would be produced by a 4% tax computed upon the actual gross receipts for the same year. The statement shows, for illustrative purposes, a similar absurd result and similar agreement in the amount of the gross receipts tax and ad valorem tax when a gross receipts tax of 10% is assumed. It would likewise show similar results and similar agreement of the amount of the gross receipts tax and ad valorem tax when "harmonized" by this "theoretical method" if *any other percentage* should have been fixed by the Legislature.

But if we ascertain the valuation upon the theory that the assessed valuation of property in the state was 45.1% of full value, as stated by the Court below and shown in the record (Transcript No. 464, page 60), and the average tax rate $2.53 per hundred as also shown (Transcript No. 464, page 60) and which the same report elsewhere demonstrates was actually 2.525 plus, we would get the same amount of valuation as that necessary to produce an ad valorem tax equal to the gross receipts tax at 3%.

Then, for the year 1912, in which the gross receipts amounted to $2,081,091.38, on which a gross receipts tax of 4% was imposed in 1913, the tax amounting to $83,243.66 as compared with $58,619.98 for the previous year (Transcript No. 464,

page 60), then, by the same procedure on the basis of 45.1% of full value, we find there is produced a valuation of $7,238,579.13. This, although there is nothing in the record to show and there was not in fact, any increase in the property or in the value of the property, and but 6½% increase in the amount of gross receipts over the previous year. This increase then in the supposititious valuation from $5,148,426.13 in 1912 to $7,238,579.13 in 1913, an increase of over 40%, and the increase in the amount of the tax from the year previous of over 42%, were brought about solely by the increase in the rate of the gross receipts tax from 3% to 4%, made by the Legislature prior to the filing of the report of gross receipts for the year 1912, *and before the Legislature could possibly have known what per cent. of the gross receipts would be the equivalent of any tax that might be produced at the average rate of taxation within the State under an ad valorem method.*

This theoretical method is not only arbitrary, but rigid and unyielding, and is based not upon the value of the property taxed, either intrinsically as property having a fixed or market value, nor upon its value measured by receipts indicating the value of its use, but is based upon the amount of the tax which it is desired to impose upon the plaintiff in error, and is determined by applying an arbitrary *fixed percentage* to the receipts, computing the tax thereby, and subsequently by this theoretical process *building up* a property valuation to fit.

Our illustration shows how the valuation (*not value*) of the same property was increased over 40% from one year to another by increasing the rate of the gross receipts tax, although neither the property nor its actual value nor the receipts from its use were materially more in the latter than in the former of the two years.

The State simply required more money, and to attain this object the percentage of the gross receipts tax was increased one-third. By the use of this theoretical method and formula of alleged reconciliation, the constructive valuation of the property was subsequently *forced up* to make it sufficient to apparently justify the increased tax rate and the increased amount of the tax resulting therefrom.

In *Standard Oil Co. v. Howe*, 257 Fed. 481, the County tax authorities of Arizona had assessed the property of the Oil Company, a California corporation, for an aggregate of $342,706. The State Tax Commission increased this assessment to $2,900,000, their process being to take the net profits determined on what they termed the Arizona business and capitalize it at a fixed percentage. The court held that the action of the commission was arbitrary and resulted in a tax upon transactions in interstate commerce and property without the state, saying (pp. 485-486):

> "The position of the board is that the method followed was 'what is known as the capitalized income plan' for ascertaining or valuing the intangible property of the corpora-

tion assessed, and it is argued that the board used the term 'excessive earnings' in its ordinarily accepted meaning, intending to convey the information that the increase was on that part of the capitalized income over and above the value of the tangible property, and it is said that such method resolves itself into a simple assessment of intangible valuation.

But there is no statutory authority in Arizona for taxation of the earnings of the appellant corporation; nor is there any provision which authorizes the board to judge of what earnings are excessive, or as to how heavily such earnings may be taxed. * * *

There was no indication given by the board of any valuation placed upon taxable, intangible property, other than as heretofore indicated, and the increase ordered upon 'tangible and intangible valuation of the real and personal property' based on excessive earnings, was made upon the real and personal property en bloc. The judgment of the board seems to have been exerted merely with the purpose of fixing a percentage on the assessed value which, in the opinion of the board, the appellant should be allowed to earn. Having determined that point, the board proceeded to capitalize appellant's earnings at the rate fixed. The next step was to increase the assessment of the corporation to the figure thus arrived at without regard to the cash value of the property owned by the corporation."

And in concluding (p. 488):

"It may become of vital importance at some time to inquire whether a tax levied upon a capitalization of a profit is not a tax upon the

profit, and whether a tax in Arizona upon profits produced by California properties would not be a tax on the California properties. Looney v. Crane, supra; Fargo v. Hart, supra; Union Tank Line v. Wright, 249 U. S. 275, 39 Sup. Ct. 276, 63 L. Ed. ——, decided since the submission of this proceeding."

In *Opinion of Justices*, 220 Mass. 613, 108 N. E. 570, the court, in considering a statute requiring the valuation of certain classes of property for taxation by capitalizing the income produced thereby at certain rates, and in holding it invalid, said that the basic theory of the law did not rest the assessment on any uniform method, that, (page 573)

> "It enables the Legislature or a public officer to readjust the multipliers according to a fluctuating judgment of what may be desirable even to the extent of accomplishing in practice great disproportion. The theory behind the bill would permit manifold classifications of diverse kinds of real as well as personal estate. If extended to its logical conclusions, it would be difficult to trace any remaining constitutional protection to the taxpayer."

The reasoning in these two cases is applicable, to the method of valuation referred to by the lower court in the cases at bar, as having been furnished by the Commission in its report of 1906.

The tax commission appointed in 1915, in its report already referred to, considered this question on page 9, saying in substance that if equity was

to be preserved in administering the tax laws, it would be necessary every two years or oftener to value the property of companies subject to the gross receipts tax law and apply the ad valorem rate theoretically, in order to obtain a comparison with the general average ad valorem rate applied to general property. On page 23 of the report the Commission states the method of arriving at the value of the corporate property—multiplying the number of shares of stock and bonds outstanding by their market valuation, and apportioning the amount to California in the ratio of the gross receipts within and without the state. This method ignores properties outside the state, represented in capital stock or securities which do not form a part of the property and business conducted in the state. The stock and bond method of valuation has received approval in various cases when the value thus obtained is properly apportioned, but the method of apportioning thus suggested or adopted by the Tax Commission has never been sanctioned. To apportion upon the basis of the very earnings themselves which are sought to be reached is figuring in a circle. It might fairly be compared to the method of allocating to one state the property and operating expenses of a carrier upon the basis of the ratio of receipts from the very rates whose fairness was being considered, which was condemned in the *Minnesota Rate Case*, 230 U. S. 352, as being an improper method of allocation for the very reason that it was figuring in a circle. The cases of *Fargo v. Hart* and *St. Louis South-*

western Ry. Co. v. Arkansas, do not warrant any such method. And it was condemned in the Oklahoma case, where it was said (p. 300):

> "In that case (Fargo v. Hart) the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the state valuable property outside of it. *The same principle would apply to a property tax measuring the total property by the total gross receipts, increased by the special outside source of income and taking a proportion of this total fixed by the ratio of business within the state to that outside.*" (Italics ours.)

As a matter of fact, a review of the record in this case and the history of the tax law, its enactment and administration shows that though attempts have been made from time to time to give the law the appearance at least of imposing a property tax, it is in fact, though so termed, an attempt to reach and tax the gross receipts of the companies subject to it, *regardless of property and of its value and without reference to either.*

(e) *The Minnesota cases and Maine v. Grand Trunk Railway are distinguishable from this case.*

The defendant in error's position is that the case at bar is governed by the *Minnesota cases*, *Maine v. Grand Trunk Railway* and *Wisconsin & Michigan Railway v. Powers*. These decisions have already been referred to in a previous section of this

brief. Each of those cases, however, is distinguishable from the present case.

United States Express Co. v. Minnesota, 223 U. S. 335. The very foundation of this decision was that the tax law there in question was a part of a system "intended to afford a means of valuing the property of the express companies within the state," which in the case of such companies, "being much of it of an intangible character, is difficult to reach and properly assess for taxation."

It is a matter of common knowledge that the value of the physical property of express companies has very little relation to the amount of their capital stock, to the owners of which the profits inure, or to the total property of such companies. In the case at bar the situation is different. Plaintiff in error has physical property to an amount equal to its capital stock, and its profits are not disproportionate as a fair return on the physical property employed in the business, which property the State has full power to tax and is able to reach by the ordinary methods of taxation. In fact, as has been shown, the same property located and employed in California, claimed to have been taxed by the gross receipts tax law, was assessed each year by the same Board for another and separate tax imposed by the ad valorem method.

As we have pointed out, the present tax was in fact "not intended to afford a means of valuing the property * * * within the State," as was

true in the Minnesota case, but was intended to reach and tax the gross receipts themselves.

Aside from this fundamental difference in the two cases, however, we think that the Minnesota case is being given a value as an authority for state taxation of earnings from interstate commerce, which is not warranted, in view of the situation passed on, by the court in that case.

There the State of Minnesota did not attempt to tax interstate earnings made partly in one state and partly in another, and divided upon the state line, as California is attempting to do in the present case. The Minnesota statute (Sec. 1013, Rev. Stat. 1905) provided for annual statements to be made to the State Auditor by express companies, showing among other things,

> "the entire receipts * * * for business done within this state, including its proportion of gross receipts for business done by such company within this state, in connection with other companies."

and the Auditor was to assess a tax (Sec. 1019, Rev. Stat. 1905),

> "upon its gross receipts for business done between points within this state."

One class of receipts taxed, apportioned on a mileage basis, was derived from transportation between local points passing out of the state en route, and the court, on the authority of *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, held the tax valid, the earlier case being decided apparently on the ground that this was not inter-

state commerce. This class of receipts is not material in the present case.

Another class of receipts taxed was derived from so-called "interstate transfer business" which fell within the words of definition in the statute,

> "its proportion of gross receipts and business done by such company within the state in connection with other companies."

These earnings were strictly "between points within the state." To give a concrete instance,—a package shipped from Seattle to some interior point in Minnesota on the line of the United States Express Company would move by Great Northern Express from Seattle to St. Paul, that company having performed the service through Washington, Idaho, Montana and North Dakota and from the North Dakota-Minnesota line to St. Paul, and would there be transferred to the United States Express Company, which would transport it to destination. The statute did not attempt to tax the Great Northern Express Company for any part of its earnings on that package either in Minnesota or elsewhere, but did tax the United States Express Company for its earnings on that package from St. Paul to destination, the entire carriage while in that company's hands being "between points within the state." As this court said (p. 341):

> "Taxes are not claimed or collected upon shipments of express matter * * * where the same express company performs the transportation service both within and without the State of Minnesota."

In other words, in the Minnesota case the express company, whose earnings were taxed, performed its entire service within the state, *for which it received a proportion of a through rate not divided upon a mileage basis or upon the state line, but agreed upon with the connecting carrier.* This proportion was segregated from interstate earnings, and was thus made, for the purposes of revenue, intrastate earnings for a local service wholly within the State. There was in no instance a tax imposed upon a proportion of earnings partly within and partly without the state, as in the case at bar. While it is true that for the purpose of regulation, the through bill of lading made the carriage an interstate shipment, the earnings were so segregated for tax purposes and were substantially payment for an intrastate service, and both the State court and this court so treated them. In the present case the tax is not upon segregated earnings within the state, but upon an undivided proportion of the entire interstate earnings.

Cudahy Packing Co. v. Minnesota, 246 U. S. 450, is also distinguishable from the present case. The same fundamental difference referred to in the United States Express case exists between this case and the case at bar, namely, in the Cudahy case the tax law was "intended to afford a means of valuing the property * * * within the State" and was not aimed at the gross receipts themselves. The question there presented was also whether the tax imposed upon gross earnings was

a fair equivalent of a tax on the property; but, as the court below states in its opinion, that issue is not raised in this case. The Minnesota statute provided that the gross earnings tax in question should be in lieu of property taxes, and this left for determination the question of whether it was a fair equivalent of a tax on property imposed by the ordinary method. The Legislature of Minnesota did not undertake to say that the property should be of a value which at the ordinary rates of taxation would produce a tax equal to that imposed upon the gross earnings. It was left as a question of fact whether or not it was such an equivalent. The Cudahy Company raised this question of fact, but its contentions were not sustained.

Moreover, as was pointed out in both the State court and this court, the receipts in question in the Cudahy case which were taxed were *not receipts for a service performed in interstate commerce*, but were earnings made by the railroad company in those cars, and as the amount paid by the railroad company to the Cudahy Company for the *rentals* of the cars had been deducted from the railroad earnings subject to taxation, the State was but getting the tax on the full railroad earnings. The holding of the court was in effect that the tax was no more than a fair equivalent for a tax on the property by the ordinary method, taking into account all the property used by the railroads in

making the earnings (including the Cudahy cars). This court said (246 U. S. 456):

> "In any event, the company (Cudahy) has an interest in the car line which yields it a rental of one cent for each mile of travel. This interest is taxable and the State values it for that purpose *by the rental* received. In valuing the property on which the railroads are taxed the amount of the rental is deducted from their earnings. This plainly discloses a purpose to avoid taxing the same property twice or at more than its value, measured by what it earns." (Italics ours.)

When the case in all its circumstances is contrasted with the case at bar, it becomes apparent that it is not, any more than the *Minnesota Express case*, an authority for sustaining the present gross receipts tax.

Maine v. Grand Trunk Railway Company, 142 U. S. 217, and *Wisconsin & Michigan Railway Co. v. Powers*, 191 U. S. 379, have been so modified by later decisions of this court that there has been, if not a reversal of those cases, at least an abandonment of the doctrine on which they were decided.

In the *Galveston case* the court said that *Maine v. Grand Trunk Railway* "seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Company* case. But it may not have been," and then proceeded to suggest a possible theory on which the case *might* stand, and the tax involved, together with the additional tax on rail-

road property, *might* be called a commutation tax. *The Galveston case*, however, as well as subsequent decisions of this court, as we have already pointed out, are practically irreconcilable on principle with the case referred to. Thus in the *Oklahoma case*, the court said (page 301):

> "It would be difficult to apply to a tax levied in these days the explanation of *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, given in *Galveston, Harrisburg* and *San Antonio Railway Co. v. Texas*, 210 U. S. 217, 226, * * * and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items."

For these reasons the two cases become practically valueless as authority bearing upon any question here presented.

(f) *The situation is exactly like that in Fargo v. Michigan and similar to that in other kindred cases.*

On the other hand, the present case is governed by that other class of decisions, the leading cases of which are *Fargo v. Michigan*, the *Philadelphia Steamship Company case*, the *Galveston case*, and the *Oklahoma case*.

The first case which stands out as a guide for interpreting the facts now presented is *Fargo v. Michigan*, 121 U. S. 230, for the situation and the character of the receipts involved in that case are not different in any material particular from the

case at bar. In that case, as has been pointed out, the State sought to levy a tax upon a percentage of the receipts of the Merchants Dispatch Transportation Company from mileage made by its cars in transporting goods from points within the State to points outside and vice versa. In this case the State seeks to levy a tax upon a percentage of the receipts from the operation of cars by plaintiff in error in movements in interstate commerce passing into, out of, or through the State. The only difference is that in the Michigan case no tax was assessed on receipts from mileage made in the course of transportation through or across the State, while California here proposes to levy upon a proportion of such receipts. If anything, the intention to tax interstate earnings as such is a little clearer here than it was in the earlier case.

In all the years of serious debate on this subject, *Fargo v. Michigan* has never been qualified or even criticized, though cited frequently. It was cited in the *United States Express Case*, and the court in that case was able to distinguish it, necessarily on the ground (for on no other can the decisions be harmonized) that in the Express Case the court was not considering a tax on a mileage proportion of interstate earnings, made partly within and partly without the State and divided on state lines, but was considering a tax on segregated earnings, made wholly within the State from a service performed wholly within the State, and from that point of view not interstate at all. The very circumstance, the absence of which enabled

the court in the Express Case to say that there was no manifest intention to aim at the interstate receipts as such, is the cardinal fact before us here, as it was in *Fargo v. Michigan*. As in that case, we believe, the intention is so clear as to justify the condemnation of the tax.

In the Court below counsel for the State sought to distinguish *Fargo v. Michigan*, 121 U. S. 230, from the cases at bar by the claim that the tax in the Michigan case was not a property tax, that the statute imposing the tax made no reference to property of the company taxed, and that the tax was not "in lieu" of any other tax, and therefore was an undisguised and open attempt to collect in the guise of taxes a percentage of interstate earnings without relation to the value of the property.

Whether or not such a claim be advanced in this Court, we desire to draw attention specifically to the provision of the Michigan statute under which the tax in *Fargo v. Michigan* was laid, and to the fact that the section which provided for the payment of the tax on gross receipts concluded with the words:

> "and such taxes shall be in lieu of all other taxes upon the cars used for the purposes mentioned in Sections 1 and 2 of this Act."

In *Philadelphia & Southern Mail Steamship Co. v. Pennsylvania*, 122 U. S. 326, a tax of a fixed percentage was imposed upon gross receipts derived from the carriage of passengers and freight between various states and between this country and

Europe, and it was held by this court to be levied so directly upon the receipts as to be invalid.

Then again in *Galveston, Harrisburg & San Antonio R. R. Co. v. Texas*, 210 U. S. 217, the tax imposed was "equal to" a stated percentage of the gross receipts of a railroad company, including receipts derived from the carriage of passengers and freight in interstate commerce from points within the state to points without and vice versa, and the court held that the case was governed by the *Philadelphia Steamship Company case*, which was declared to be "unshaken" and as stating established law.

So in *Oklahoma v. Wells, Fargo & Co.*, 223 U. S. 298, the tax imposed was "equal to" given percentages of the gross receipts of an express company, and in the case of a company operating in interstate commerce was measured by the proportion which its business within the state bore to the whole of its business, and was held to be invalid within the decision in the *Galveston case*.

All of these cases have been referred to at length in a previous section of this brief, and we simply desire to here emphasize these decisions, which on the basis of similarity of facts to the case at bar must, we believe, be accorded a controling influence. The present case falls within this class of decisions, and specifically it is on all fours with *Fargo v. Michigan*. The tax in question is aimed so directly at gross receipts as to be invalid.

The Burden of Sustaining the Tax Rests With the State.

The Court below in its opinion in the cases at bar stated that the issue of whether the tax involved was a fair equivalent of a tax on the property was not raised in these cases; and counsel for the State in the Court below charged that plaintiff in error had not in its pleadings alleged that the taxes were more than taxes would have been on the property. Such an allegation was not necessary.

The Supreme Court of California has held that the provisions under which the taxes here involved were laid cannot upon any fair construction be said to comply with a requirement that all property shall be taxed in proportion to its value; that the requirement in the constitutional amendment of California that "all property in the State except as otherwise in this Constitution provided, * * * shall be taxed in proportion to its value to be ascertained as provided by law, or as hereinafter provided" was designed to avoid any possible conflict with the provision for the assessment of taxes on gross earnings, Section 14, Article 13 of the Constitution. This holding was in *Bank of California v. Roberts*, 173 California, p. 402. Interstate earnings were not before the Court in that case.

When the entire subject on which a tax is laid is within the jurisdiction of, and subject to the

unlimited power of the State, we must, of course, agree with what the State Court there said, and in such case its decision would probably be binding upon this Court, but when the avails of business conducted in interstate commerce are involved, and thus *prima facie* a forbidden subject is taxed, this Court has repeatedly held that it will for itself determine that question.

> "Neither the state courts nor the legislature, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."
>
> *Galveston, Harrisburg & San Antonio Railway Co. v. Texas*, 210 U. S. 217, on p. 227.

This Court has also determined and held that when a forbidden subject is taxed, or attempted to be taxed, the burden of sustaining it is upon those who assert the validity of such a tax.

Foote v. Maryland, 232 U. S. 494.

The gross receipts or gross earnings tax is essentially a substituted form of taxation representing a method of reaching the same result as would be accomplished by an ad valorem property tax, and is a logical development from the doctrine that the value of property is often enhanced by its organic relation to a system. The theory is that the earnings themselves are not taxed at all, but are merely taken into account as a convenient measure of the value of the property in its organic re-

lations. The so-called "unit" plan of taxation and the gross earnings plan both profess to aim ultimately at a fair tax upon the property as such, but while the former is frankly and consistently a property tax from every aspect, the latter is a commuted or substituted tax, prima facie not a property tax at all. There is no escape from the fact, as has repeatedly been held by this Court, that on its face a levy upon earnings is in its direct effect a burden upon the operations which produce the earnings and when such a tax falls upon earnings from interstate commerce, it can be justified only by showing that the tax is not what it appears to be. As a direct levy upon such receipts, it is of necessity prima facie void as a burden on such commerce.

It may be that a valuation placed upon property by the authority charged with a duty of assessing it for taxation is presumed to be fair, but there is no such presumption in favor of a commuted or substituted tax, which depends for its validity upon a showing that it is in effect something different from what it appears to be. There is no presumption that a tax levied by a state upon receipts from interstate commerce is a valid property tax. The burden of proof is reversed and those who assert the validity of such a tax are required to explain and sustain it by affirmative proof showing that its prima facie effect is not its final effect.

This court in *Foote v. Maryland*, 232 U. S. 494, expressed views in accordance with these princi-

ples. The case involved the validity of an inspection fee charged by the State for inspecting oysters shipped into Maryland from Maryland, Virginia and New Jersey waters. The contention was that the fee, which was a flat one of a cent a bushel, was excessive and that it was an interference with interstate commerce. It appeared from the statute providing for the fee that the proceeds of the tax were to be used partly for inspection purposes and partly for other purposes, such as the policing of State waters. This court held that the tax was necessarily void as a burden on interstate commerce because it exceeded the amount necesary for inspection purposes, and the court treated the situation as one in which the presumption was clearly against the validity of the tax. The court said (pp. 503-508):

> "But while the two duties may sometimes overlap there is a difference between policing and inspection, and if the State imposes upon one set of officers the performance of the two duties and pays the whole or a part of the joint expenses out of inspection fees, *it must be made to appear* that such tax does not materially exceed the cost of inspection—*the burden in such cases being on those seeking to collect the combined charge.* * * *
>
> But the commingling of these various duties, paid for out of a fund raised for inspection, does not necessarily show that the fee is excessive. *For the presumption of invalidity* arising from such intermingling might be met *by carrying the burden of showing* that, while the statute required payment out of

such joint fund, the collections were not sufficient, but only helped, to pay the definitely ascertained expenses of inspection. * * *

In the light of the operation of the previous act and *the failure to show* that the amount collected under the new, would not be more than was necessary for the expenses of inspection proper, the present statute must be held to be void." (Italics ours.)

The burden of establishing the validity of the present gross receipts tax clearly rests with the State of California.

The Forfeiture Clause of the Tax Law Renders it Invalid.

Section 24 of Chapter 335, Laws of 1911, as amended, provides for the forfeiture of the charter of a domestic corporation, and the forfeiture of the right to do business in the State of a foreign corporation, if the tax in question is not paid; and Section 24a (added by Chap. 320, Laws of 1913) makes it unlawful for any corporation so delinquent to exercise corporate powers or transact business in the state, declaring it a misdemeanor for any person to exercise its powers or transact its business (save to settle its affairs) thereafter.

The usual provisions for the enforcement of a tax against property are absent and in their stead appear these stringent forfeiture provisions. The law provides no method by which the corporation taxed may question the legality of the tax before payment. The tax must be paid whether valid or invalid, and a failure or refusal to pay, an assertion of the right to enjoin the collection of the tax, entails the deprivation of its right to transact *any business* in the State save to settle its affairs.

It is true that the statute provides for a payment under protest and that suit to recover may be brought (as was done in these cases), but that course imposes upon the taxpayer the payment to the State of a tax claimed to be illegal in order to avoid a forfeiture and deprivation of the right to

do (or *continue* to do) business in the State. That imposition is of itself a penalty.

Atchison, Topeka & Santa Fe Railway v. O'Connor, 223 U. S. 280.

The State, however, has no power to forfeit the right of a foreign corporation to engage or continue in interstate commerce in the state, nor can it make its right to engage or continue in intrastate business in the state conditional upon the payment of a tax upon interstate commerce.

In *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, it was held that a Tennessee statute, which imposed a privilege tax of a certain rate upon every sleeping car used or run over a railroad in the state and not owned by the railroad on which it was run, was void so far as it applied to the interstate transportation of passengers carried in such cars, owned by a foreign corporation and leased to the railroad. The tax was not in terms imposed on either the subject of or the earnings from interstate transportation, but the court held that the case fell within the *State Freight Tax case*, and said (p. 44):

> "*The tax imposed was a condition prescribed*, without complying with which what was done by the plaintiff (Car Company) was made illegal." (Italics ours.)

In *Western Union Tel Co. v. Mass.*, 125 U. S. 530, the court held that a state statute which authorized an injunction to be issued to restrain a foreign corporation whose taxes were in arrear,

from prosecuting its business in the tsate until paid, was void as applied to a telegraph company operating its lines over military and post roads of the United States (p. 554):

> "The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions 'shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States.' It is found in this case that 2334.55 miles of the company's lines, out of 2833.05 on which this tax is assessed, are along and over such post-roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State. * * *
>
> If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous.
>
> In holding this portion of section 54 of chapter 13 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—executions, sequestration, and any other appropriate remedy in chancery."

See also *Le Loup v. Mobile*, 127 U. S. 640, already referred to.

In *Allen v. Pullman Palace Car Co.*, 191 U. S. 171, this court, in holding another statute of Tennessee to be invalid, which imposed a privilege tax upon sleeping car companies for doing business in the state, of a certain sum per car, and which by its terms applied to cars running through the state as well as those operated wholly within it, said of the act in question, after referring to the earlier statute passed upon in *Pickard v. Pullman Southern Car Co.* (p. 179):

> "The act in its terms applies to cars running through the state as well as those whose operation is wholly *intra*-state. It applies to all alike, and requires payment for the privilege of running the cars of the company regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the State. There is no decision of the Supreme Court of Tennessee limiting the act in its operation to *intra*-state traffic. It is true that the comptroller has sought to restrain the operation of the law by imposing the tax for two years upon cars running between Nashville and Memphis and between Nashville and Chattanooga for two years, and fixing one car in each year as the proportion of local business done in interstate cars for two years. But this action does not conclude the State in taxing for other years, and the action taken by the comptroller does not limit the terms of the law affecting interstate commerce."

In *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1, in which it was held that the rule that a State may exclude foreign corporations from its limits or impose such terms as it chooses upon the right to transact business within the State is not applicable in the case of foreign corporations engaged in interstate commerce, there is an interesting discussion of principles applicable here. In the statute involved there it was expressly declared that the imposition of the tax did not and should not affect the right of the corporation to engage in interstate commerce within the state; but the court said that such a disavowal of a purpose to burden interstate commerce was not conclusive of the question as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce.

We assert that under the decisions of this court it could make no difference in the determination of this question in the present case if the court below were to have held, or if this court were to hold, that the forfeiture declared pertained only to the doing of intrastate business when the tax to be paid in order to avoid a forfeiture is a tax levied upon interstate as well as intra-state receipts. What this court held in *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, and in *Pullman Co. v. Kansas,* 216 U. S. 56, and also what this court held in *St. Louis & S. W. Ry. v. Arkansas,* 235 U. S. 350, demonstrates conclusively the correctness of our assertion.

The statute involved in both the *Western Union* and *Pullman* cases concerning the forfeiture and

concerning the condition upon which the Western Union Company and the Pullman Company might have been admitted to do business in Kansas, as stated in the report of the *Western Union* case in the State Supreme Court (90 Pac. 299, 302, et seq.), an epitome of which is also contained in the statement of the case in this court (216 U. S. 3, et seq.), shows great similarity in all essential particulars to the California statute involved in the cases at bar.

In the statement of the case in this court it is recited that the Kansas statute required an application to be made to the charter board, accompanied by the payment of a fee of graded fixed percentages upon the authorized capital stock, and that these provisions applied to a foreign corporation as well as to a domestic corporation, that it was made the duty of each corporation doing business in Kansas to file certain statements, and that failure to file such statements by any corporation doing business in the state and not organized under the laws of the state should work a forfeiture of its right or authority to do business in the state, and the charter board might at any time declare such forfeiture and should forthwith publish such declaration in the official state paper (216 U. S. 6).

It further appears in the statement of the case in this court that the charter board granted the Western Union Company's application conditionally upon the payment by that company of a statu-

tory percentage upon its authorized capital amounting to $20,100, and in its order recited:

> "That nothing herein contained shall apply to nor be construed as restricting in anywise the transaction by the said applicant of its interstate business nor its business for the Federal government; but that this grant of authority and requirement as to payment relate only to the business transacted wholly within the State of Kansas." (216 U. S. 7.)

The Supreme Court of Kansas construed the statute as excluding foreign corporations from the transaction of intrastate business only (90 Pac. 303-304); but notwithstanding the declaration of the charter board in making its order for the admission of the Western Union Company upon condition of the payment of the charter fee as imposed and notwithstanding the similar declaration of the State Supreme Court in its opinion, this court nevertheless held and said (216 U. S. 27):

> "But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. * * * This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."

On page 30 the court said:

> "* * * Disregarding mere forms of ex-

pression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent *of its authorized capital*, representing, as that capital clearly does, *all* of its business and property, both within and *outside of the State*, a *condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State." (Italics are the court's.)

And on pages 31 and 32 this court said:

"So, in the case now before us, the exaction, as a condition of the privilege of continuing to do or doing local business in Kansas, that the Telegraph Company shall pay *a given per cent of its authorized capital stock*, is, for every practical purpose, a tax both on the company's local business in Kansas, and on its interstate business or on the privilege of doing interstate business; for, the statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made, *in express words*, a condition of doing local business that the Telegraph Company should submit to taxation upon both its interstate *and* intrastate business and upon its interests and property everywhere, as represented by its capital stock." (Italics are the court's.)

The language we have just quoted is in effect repeated on page 37 and again substantially on page 47, and the court stated the same principle in

slightly different form on pages 34-35, where it said:

> "Whatever may be the extent of the State's authority over intrastate business, was it competent for the State to require that the Telegraph Company—which surely had the right to enter and remain in the State for interstate business—as a *condition of its right to continue doing domestic business in Kansas should pay*, in the form of a fee, *a specified per cent of its capital stock* representing the interests, property and operations of the company not only in Kansas, but throughout the United States and foreign countries? Is such a regulation consistent with the power of Congress to regulate commerce among the States, or with rights, growing out of such commerce, and secured by the Constitution of the United States? * * * Can such a regulation be deemed constitutional any more than one requiring the company *as a condition of its doing intrastate business*, that it should surrender its right, for instance, to invoke the protection of the Constitution when it is proposed to deprive it of its property without due process of law, or to deny it the equal protection of the laws?"

The specific taxation of the earnings from interstate commerce in the present case, with the forfeiture provisions in case of non-payment, bring the situation within the principles involved in these questions which were all answered by the court in the negative.

Everything said by the court in the *Western Union* case applies with equal force in the *Pull-*

man Company case (216 U. S. 56). In the concurring opinion of Mr. Justice White in that case, it was said at pages 68-69:

> "As it is obvious that the Pullman Company, in so far as it was engaged in interstate commerce within the State of Kansas, was independent of the will of the State, it follows that the State had no absolute power to exclude the corporation, and therefore no authority *to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with the interstate commerce business.* The power to exclude in such a case being only relative, affords no warrant for the exertion by the State of an absolute prohibition. * * *
>
> Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the State, a state law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce * * *. This follows, since the imposition on a corporation which has the right to do interstate commerce business within the State of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce business." (Italics ours.)

What this court held in the *Western Union Tel. Co. v. Kansas* and *Pullman Company v. Kansas* cases is not in the slightest degree inconsistent with what was held in *St. Louis & S. W. Ry. v.*

Arkansas, 235 U. S. 350. Nor is it inconsistent with the court's assumption in the latter case that the State Court in that case would have held that the franchise to be forfeited was confined to intrastate commerce. The situation was somewhat different in the Arkansas case from that involved in the two Kansas cases. The statute involved in that case was held by the court to impose a privilege tax upon the exercise of a franchise relating solely to intrastate business, *based on the amount and value of its property within the State*, and so was not a burden on interstate commerce as was the Kansas statute, the tax being within the doctrine of *Postal Telegraph Co. v. Adams*, 155 U. S. 688. There was in the Arkansas case no requirement of a tax based upon receipts from interstate commerce, and no requirement of a tax upon property outside and business done outside the State or done in interstate commerce. But the tax was based, as the State Court and this Court found, *upon the amount and value of the property within the state*. This court, in passing on the forfeiture clause of the act, said that it would assume that the State Court would hold that the forfeiture applied to intrastate commerce only, under the circumstances. The following paragraphs are applicable, however, to the present case as stating the general rule (235 U. S., 368):

> "By § 20 of Act No. 112, it is enacted: 'In case any corporation shall fail to pay the franchise tax prescribed by this Act when it be-

comes due during the term of said certificate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed in this Act.'

If this must needs be construed to mean that for non-payment of the franchise tax a foreign railroad corporation engaged in business as a common carrier of intrastate and interstate commerce is to forfeit its right to do business in the State, not only with respect to intrastate, but also with respect to interstate commerce, the effect would be to impose a condition upon its right to transact interstate commerce, and the act would be invalid as amounting in effect to a regulation of that commerce; unless, indeed, § 20 could be treated as separable." (Italics ours.)

As we have already pointed out, the case at bar is unlike this Arkansas case: First, because the tax is not of the same character. It is not a tax based upon the amount and value of the property within the State, but imposes a burden on interstate commerce in taxing the receipts from such commerce. Second, the statute of California declares a forfeiture for non-payment of the whole tax, *including that levied upon the receipts from interstate commerce*, and which applies to the doing of *any* business in the State and is, therefore, not in any event susceptible of the construction placed on the Arkansas forfeiture provision. The latter point of difference will be discussed at length hereafter.

Taking these three cases together, what this court therein decided amounts to this: that where a tax is imposed upon property by amount and value within the State and there is a forfeiture clause in case of nonpayment, it will be presumed that the State Court will hold the forfeiture to relate to the right to do intrastate business only, and in such a case not only the tax but the forfeiture is within the conceded powers of the State; but where a tax is laid upon the forbidden subject of interstate business and required to be paid upon interstate earnings or receipts in order to prevent a forfeiture of the right to do intrastate business, neither the tax nor the forfeiture are lawful because, as this Court said in the *Western Union Co. v. Kansas case*, in effect, it is as much a burden on interstate commerce to tax it for the privilege of doing intrastate business as it would be if it were taxed for the privilege of doing interstate business (216 U. S. 32).

And in *Atchison etc. Ry. Co. v. O'Connor*, 223 U. S. 280, which was an action to recover taxes paid to the State of Colorado under duress and protest, the court said on page 285:

> "The tax is a tax of two cents upon each one thousand dollars of the plaintiff's capital stock. Session Laws of Colorado, 1907, c. 211 (April 1, 1907). The plaintiff is a Kansas corporation. The greater part of its property and business is outside of the State of Colorado, and of the business done within that State but a small proportion is local, the greater part being commerce among the

states. Therefore it is obvious that the tax is of the kind decided by this court to be unconstitutional, since the decision below in the present case, even if the temporary forfeiture of the right to do business declared by the statute be confined by construction, as it seems to have been below, to business wholly within the state. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, *Pullman Co. v. Kansas*, 216 U. S. 56. *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146."

It is evident, in view of the foregoing decisions, that the State may not levy a tax upon receipts from interstate commerce whose payment is made a condition precedent to the right to carry on or continue to do even intrastate business in the State. In other words, the collection of the tax must in any case be left to the ordinary means devised for the collection of taxes.

Referring now to the forfeiture clause of the statute in the case at bar:

Section 24 provides for notice to the delinquent company, and

"if the taxes, penalties and costs are not paid within the time specified in said notice, the Comptroller shall * * * mark on the record of assessment for state taxes opposite the assessment of the delinquent company the words 'charter forfeited to the state' if the delinquent company be a domestic corporation, and thereupon said charter shall be so forfeited, and if the delinquent company be a foreign corporation, the words 'right to do business forfeited' and thereupon said right to do business shall be so forfeited."

To make the forfeiture of the right to do business effective, it is further provided that the Comptroller must report to the Secretary of State, who in turn must report to the Governor, the name and number of the charter of the corporation whose charter or right to do business has been forfeited for non-payment of taxes. The Governor must forthwith issue his proclamation declaring that the charter or right to do business in the state has been forfeited. The proclamation shall be filed immediately in the office of the Secretary of State, who shall publish the same officially in newspapers of general circulation, and the Secretary of State shall transmit certified copies of the proclamation to each county clerk in the state, who shall file them in his office.

A corporation whose right to do business has been so forfeited may only be relieved of the forfeiture and acquire again the right to do business upon payment of all the taxes, penalties and costs due the state, and in addition pay for every year subsequent to the forfeiture up to the time of making the payment an amount equal to the tax levied in the year in which the forfeiture occurred, with no means provided for questioning the legality before the payment required as a condition precedent to continuing or being reinstated in its right to conduct a perfectly lawful business. Of course, these provisions for so-called "rehabilitation", subsequent to the forfeiture, do not add to or take from the force of the provision for the forfeiture itself; but they do show an intention to

make the penalties so burdensome as to amount to extraordinary means for forcing the corporation to pay the taxes levied under the act, in order to avoid the forfeiture and other extreme penalties as conditions precedent to being relieved from the forfeiture.

Atchison, Topeka & Santa Fe Railway v. O'Connor, 223 U. S. 280.

It is obviously provided that the right of a foreign corporation, engaged in both interstate and intrastate commerce in California, to continue to do business within the state is made to depend upon the payment of a tax assessed upon the gross receipts of the company, not only from business wholly within the state, but also upon a mileage proportion of the interstate business, and while the tax does not in terms purport to be a privilege tax, its payment is required as a condition precedent to the privilege of continuing to do business within the state, and if not paid, the right to do business shall be forfeited.

It is evident that the forfeiture provisions must be held to apply to all the business, both state and interstate, and equally plain that the entire tax upon receipts from interstate as well as intrastate business must be paid to secure the right to continue to do business. The provisions with respect to the tax and its subject and the forfeiture for failure to pay are all in the same statute and must be considered together. The business referred to in the statute must be held to be the same business wherever referred to unless by some

special designation, its use in one place may be distinguished from its use elsewhere. Referring to Section 2 of the Act, we have the following language:

> "Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies and each thereof, within this state. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into or out of this state."

We have a specific description of what "gross receipts within this state shall be deemed to be," which includes a specific description of interstate business in the case of companies "operating partly within and partly without the State" and a statement that the tax shall be equal to percentages fixed "upon the gross receipts from operation * * * within this state." There can be no doubt that "gross receipts from operation" means from "the operation of their business within this state." Referring to the forfeiture provision in Section 24, the language used is:

> "If the taxes, penalties and costs are not paid * * * the Comptroller shall * * * mark on the record * * * 'right to do business forfeited' and thereupon said right to do business shall be so forfeited."

Plainly the taxes referred to are *all* the taxes, including those on interstate receipts. If there were any doubt that the requirement was that *all* the taxes must be paid, including those upon interstate commerce, in order to avoid a forfeiture, Section 24a, already referred to, which was added in 1913, settles that doubt, since it provides that it shall be unlawful for any company which has not paid to the State "*all taxes, penalties and costs as in this Act prescribed and levied to exercise the powers of such company or to transact any business in the state.*" There can be no question that the right to do business, which the statute provides shall be forfeited if all the taxes are not paid, means the right to do the same "business" previously defined in the statute on which the tax is assessed, and the failure to pay which is the basis of the forfeiture.

The right to do an interstate business cannot be made contingent upon the payment of this tax, nor could it be made contingent upon the payment of a valid tax, which this is not.

The court below, in its opinion, refused to pass upon the question of the effect of this forfeiture clause on the validity of the tax, saying that the question is not involved in an action to recover taxes already paid. We believe that the court erred in so holding, and that it was led to dismiss the contentions of plaintiff in error on this point by a misapprehension of what was said by this court in *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350. As we have pointed out,

that case is not apposite to the present one. The tax involved there was a privilege tax for the transaction of intrastate business, imposed on property and based upon the amount and value of the property within the taxing jurisdiction of the State. Having that in mind, this court, in considering the forfeiture provision of the law, said that if it must be construed as calling for a forfeiture of the right to do interstate business as well as intrastate, it would be invalid, but that (pp. 368-369):

> "The state court has not as yet construed the section as calling for the forfeiture of the privilege of doing interstate business in the event of non-payment of the franchise tax; nor is the State here insisting upon such a construction. The present is an ordinary action to collect the tax as a debt, and not to forfeit the franchise for its nonpayment. *Non constat* but that the state court will hold, when confronted with the question, that the franchise to be forfeited pursuant to § 20 is confined to intrastate commerce. Such a construction is clearly foreshadowed by what the court has in this case held with respect to the general purpose of the act. And in exercising the jurisdiction conferred by § 237, Jud. Code, it is proper for this court to wait until the state court has adopted a construction of the statute under attack, rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the Federal Constitution."

The court then goes on to state and decide the real question before it as follows:

"At present, therefore, we have merely to consider whether § 20 so clearly requires a forfeiture of the interstate franchise for nonpayment of the tax in question that it is not reasonable to anticipate that the state court will put another construction upon it * * *

It does not seem to us that § 20, when taken in connection with the context, requires to be so construed as to interfere with interstate commerce. The taxing provisions of the act apply to all corporations doing business in the State for profit, whether organized under its laws, or under the laws of other States, or of foreign countries, and entirely irrespective of the question whether they are engaged in commerce. Therefore it was natural that, in such a provision as is contained in § 20, language having upon its face a general scope should be adopted; but it need not be indiscriminately applied to all the several kinds of corporations that are subject to the act. The forfeiture in terms is of 'the right of such corporation to do business in this State.' This does not necessarily include the right to transact business that is done partly within and partly without the State. The section does not call for an annulment of the charter. That topic is covered by § 15 of the same act, which applies, however, only to corporations organized under the laws of Arkansas or of foreign countries, and not to corporations of other States, to which class plaintiff in error belongs.

In view of all these considerations, we ought to assume, until the State, through its judicial or administrative officers, places a different construction upon the act, that § 20 will be

> limited in its operation to forfeiting for non-payment of the franchise tax only the privilege of doing intrastate business; or else that the section, being void for unconstitutionality, will be treated as severable from the other provisions of the act."

It will be noted that the court expressly states that if the forfeiture clause "*must needs be construed*" to call for a forfeiture of the right to do interstate commerce, "*the act would be invalid* as amounting in effect to a regulation of that commerce," and that "this result would follow" from cases cited, including *Western Union Tel. Co. v. Mass.*, *Le Loup v. Mobile*, and *Allen v. Pullman Palace Car Co.*

Allen v. Pullman Palace Car Co., 171 U. S. 17, and *Pickard v. Pullman Sou. Car Co.*, 117 U. S. 34, were both suits to recover taxes paid under protest, and in both cases the tax was held invalid because its payment was made a condition of the right to do business in the state. In none of the cases cited which we have reviewed is there any intimation by this court that the conditioning of the right to do business in the state upon the payment of the tax, either by forfeiture clause or otherwise, is involved only in an action seeking to oust the corporation from the state or enforce the forfeiture clause. Every pronouncement of this court is to the contrary.

The *St. Louis Southwestern case* cannot be urged in support of the lower court's refusal to pass upon the validity of the forfeiture clause, which in the case at bar clearly requires a forfeiture of the right to do interstate business upon the nonpayment of the tax—a tax which in addition is presumptively invalid in that it is imposed upon receipts derived from interstate commerce, which presumption the defendant in error has not overcome. Neither of these elements was present in the earlier case, and nothing said by this court in the opinion warranted the lower court in refusing to pass upon this question in the case at bar.

In *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, Chief Justice Fuller, in speaking of the State's right to tax the property within its borders, although employed in interstate commerce, said that such a tax might be imposed if its amount was made dependent in fact on the value of the property situated within the state.

> (p. 696) "*and if the payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.*" (Italics ours.)

And again, speaking of the tax involved in the case (p. 698):

> "*The taxation was neither arbitrary nor discriminating, nor, so far as we are advised, was payment made a condition precedent to doing business, but collection was enforceable by suit and the remedies pertaining thereto, and not otherwise.*" (Italics ours.)

Even if the California Supreme Court should hold (or should have held) that the prohibition in the forfeiture clause applied only to a prohibition from doing intrastate business, the law would still stand condemned under the express rule decided in the *Western Union v. Kansas case* (216 U. S. 1), and under the principles held in the *St. Louis S. W. Ry. v. Arkansas case*, because payment of a tax on the fruits of interstate commerce would then be required as a condition of doing intrastate business.

It is submitted that the forfeiture clause in Chapter 335, Laws of 1911, as amended, renders the entire tax law invalid for the reasons stated, the clause being inseparably connected with the other provisions of the Act.

CONCLUSION.

It is urged that upon the record in this case the tax imposed, under the constitutional and statutory provisions to which reference has been made, is invalid, for the reason that it is imposed directly upon gross receipts derived from interstate commerce and upon receipts of property and business without the state, that it constitutes an interference and burden upon interstate commerce, and deprives plaintiff in error of its property without due process of law.

Further, it is urged that the tax is invalid in that its payment is demanded as a condition upon which plaintiff in error is permitted to engage in any business in the state, nonpayment resulting in the forfeiture of its right to carry on either local or interstate business within California.

We feel justified in asserting that, in view of all the circumstances, this case falls within the class of those in which it has been held by this court that the tax involved is invalid as in violation of the Constitution of the United States.

Respectfully submitted,

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APPENDIX.

Section 14, Article XIII, Constitution of California.

The constitutional provision, being an amendment adopted at the election of November 8, 1910, reads so far as pertinent as follows:

> "Sec. 14. Taxes levied, assessed and collected, as heretofore provided, upon * * * sleeping car, dining car, drawing room car and palace car companies * * * operating upon railroads in this state * * * shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. * * *
>
> (a) * * * All sleeping car, dining car, drawing room car and palace car companies * * * operating upon the railroads in this state * * * shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock * * * and other property, or any part thereof, used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies and each thereof, within this state. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage with-

in this state to the entire mileage over which such business is done, of receipts on all business passing through, into or out of this state.

The percentages above mentioned shall be as follows: * * * on all sleeping car, dining car, drawing room car, palace car companies * * three per cent * * * such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies, except, as otherwise in this section provided. * * *

(f) * * * The rates of taxation fixed in this section shall remain in force until changed by the legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof."

Chapter 335, *Laws of* 1911.

This is a very comprehensive enactment entitled,

"An act to carry into effect the provisions of section fourteen of article thirteen of the constitution of the State of California as said constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations, banks and insurance companies for the benefit of the state, all relating to revenue and taxation."

The following is a summary of some of the provisions of the act, the matter in single space being taken from the act verbatim:

Sections 1 and 2 of the Act follow the language of the Constitutional amendment.

Section 7 of the Act reads in part as follows:

> "The term 'gross receipts from operation' as used in section two of this act is hereby defined to include all sums received from business done within this state, during the year ending the thirty-first day of December last preceding.
> * * *
>
> In case of companies operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and the proportion based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into or out of this state.
> * * *
>
> Income derived from property not defined in this act as operative property shall not be included in the gross receipts for the purpose of determining the tax on the property and franchises provided for in section two of this act."

Section 8 defines the term "operative property" as used in the act as including:

> "(b) In the case of sleeping car, dining car, drawing room car and palace car companies * * * operating upon railroads in this state: The franchises, cars, and other rolling stock."

Section 9 provides for the filing of reports on or before the first Monday in March in each year,

showing in detail for the calendar year preceding, the name of the company, an enumeration of all its property in the state, and

> "When any such company operates both within and without this state it shall report the mileage over which it operates both within and without this state."

the amount of its capital stock, dividends paid, surplus, funded and floating debts, market value of stock and bonds, the amount expended for improvements, and

> "The gross receipts from operation within this state for the year ending the thirty-first day of December last preceding, the gross receipts from such classes of business as the state board of equalization may designate, to be reported separately; also, where the property and business are partly within and partly without this state, the gross receipts for said period on all business beginning and ending entirely within this state, and that proportion of the gross receipts from all business passing through, into, or out of this state, which the mileage within this state bears to the total mileage over which such interstate business is done as further defined in section seven of this act."

the operating and other expenses, balances of profit and loss, and such other matters as the State Board may deem necessary to enable it to assess and levy the taxes provided for.

Section 18 provides that the State Board of Equalization must, between the first Monday in March and the third Monday before the first Mon-

day in July, assess and levy the taxes in the manner provided for in the Act and in the Constitution, the assessments being made to the company owning or operating the property subject to the tax, and for the publication of a notice stating that the assessment has been completed and that the record of assessments will be delivered to the State Comptroller on the first Monday in July.

Section 19 provides for the delivery of the record of assessments to the Comptroller, the record to constitute a warrant for the collection of the taxes assessed.

Section 20 provides:

> "The taxes assessed and levied as provided in section fourteen of article thirteen of the constitution of this state, and in and by the provisions of this act, shall be due and payable on the first Monday in July in each year, and one-half thereof shall be delinquent on the sixth Monday after said first Monday in July at six o'clock P. M., and unless paid prior thereto, fifteen per cent shall be added to the amount thereof, and unless paid prior to the first Monday in February next thereafter at six o'clock P. M., an additional five per cent shall be added to the amount thereof; and the unpaid portion, or the remaining one-half of said taxes, shall become delinquent on the first Monday in February next succeeding the day upon which they became due and payable at six o'clock P. M.; and if not paid prior thereto five per cent shall be added to the amount thereof;"

and provides for a further notice by the Comptroller that the taxes are so due. Section 21 provides that the taxes shall constitute a lien on the property and franchises of the companies subject to taxation. Section 22 provides for their payment to the State Treasurer upon order of the Comptroller.

Section 23 provides as follows:

> "Any company, person, or association dissatisfied with any assessment made by the state board of equalization may bring an action against the state treasurer for the recovery of any taxes, penalties, or costs paid on such assessment, but no such action may be brought later than the third Monday in February next following the day on which the taxes were due, nor unless such company, person or association shall have filed with the state controller at the time of payment of such taxes a written protest stating whether the whole assessment is claimed to be void, or if a part only, what part, and the grounds upon which such claim is founded; and when so paid under protest the payment shall in no case be regarded as voluntary."

Section 24 (which was amended in some respects by Chapter 6, Laws of 1913) provides that within ten days after the first Monday in February the comptroller shall notify the company that the tax is delinquent, stating its amount with penalties and cost and that if the same is not paid on or before the Saturday preceding the first Monday of March thereafter, the delinquent company will for-

feit its charter to the state, and if it be a foreign corporation will forfeit its right to do business in the state. If the taxes with penalties and costs are not paid within the time specified, the comptroller shall record on the record of assessments the forfeiture of the charter or the right to do business, and shall report such forfeiture to the Secretary of State, who shall report to the Governor, who shall issue a proclamation declaring that

> "The charters of such domestic corporations have been forfeited and the right of such foreign corporations to do business in this state have been forfeited."

This proclamation shall be filed at once in the office of the Secretary of State, and shall be published by him in newspapers of general circulation and a certified copy of the proclamation shall be filed in the office of each county clerk in the state.

Then follow provisions for rehabilitation of a delinquent corporation as follows:

> "Any such corporation making subsequent payment of all taxes, penalties, and costs due the state, and in addition thereto an amount equal to the taxes levied under this act for the year in which such forfeiture occurred, for each year subsequent to such forfeiture and to the time of such redemption, shall be relieved of such forfeiture, and the controller shall notify the secretary of state thereof, and the secretary of state shall annually on the first Monday in April transmit to the county clerk of each county in this state a list of the corporations so paying, and which have been re-

lieved of such forfeiture, which list shall be by said county clerk filed in this office; provided, the rehabilitation of a corporation under the provisions of this act shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture."

Chapter 6, *Laws of* 1913.

This Act amended Chapter 335, Laws of 1911, in various respects, the only amendment important here being an increase in the rate of taxation on sleeping car, dining car, drawing room car and palace car companies operating upon the railroads in the state from three to four per cent.

Chapter 320, *Laws of* 1913.

This Act amended Chapter 335, Laws of 1911, by adding a new section, termed section 24-A, which reads as follows:

"It shall be unlawful for any company, either domestic or foreign, which has not paid to the state all taxes, penalties and costs as in this act prescribed and levied, to exercise the powers of such company, or to transact any business in this state, after the Saturday preceding the first Monday in March following its delinquency. Each and every person exercising any of the powers of such delinquent company or transacting any business for or in behalf of such company after the Saturday preceding the first Monday in March following the delinquency of such company, as provided in this act, except to settle the affairs of such company, shall be guilty of a misdemeanor,

and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars for each day such violation of the law continues, which fine shall be paid into the general fund of the state treasury."

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WM. R. STANSBU
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

148 148

Nos. 464, 465, 466, 467, 468, 469.

THE PULLMAN COMPANY,
Plaintiff-in-Error,
vs.
FRIEND W. RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA.

No. 148

WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, AND
THE PULLMAN COMPANY,
Plaintiffs-in-Error,
vs.
FRIEND W. RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA.

BRIEF OF DEFENDANT-IN-ERROR

U. S. WEBB,
Attorney General.

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IN THE

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OCTOBER TERM, 1921.

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THE PULLMAN COMPANY,
Plaintiff-in-Error,
vs.
FRIEND W. RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA.

No. 470.

WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, AND
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vs.
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BRIEF OF DEFENDANTS-IN-ERROR

INTRODUCTION.

SEVEN ACTIONS.

These several and separate actions were brought by the Pullman Company, a corporation organized under the laws of the State of Illinois, and engaged in the business of operating sleeping cars and parlor

cars upon the railroads in California and in other states, to recover a portion of the taxes paid by the company to the State Treasurer of California for each year of the years 1912, 1913, 1914, 1915, 1916, 1917 and 1918.

ACTIONS ARE BROUGHT UNDER PARAGRAPH (g), SECTION 14, ARTICLE XIII, CONSTITUTION OF CALIFORNIA.

These actions are brought under a provision of the constitution of the State of California, to wit, paragraph (*g*), section 14, article XIII, which reads in part as follows:

> "* * *; but after payment action may be maintained to recover any tax illegally collected in such manner and at such time as may now or hereafter be provided by law."

The statutory provisions giving effect to this privilege to sue the state in its own courts are to be found in chapter 335, Statutes 1911, and

Section 3669*a*, *Political Code*.

The taxes were paid under protest and all steps proper and necessary to the institution of suits by appellant were taken.

ACTIONS REFER TO PART OF TAX ONLY.

Each action is for recovery of a part only of the total tax paid by appellant in the year to which it refers. The part of the tax sought to be recovered is in each case a sum computed upon the receipts from

passenger fares paid to the company for travel within the State of California by persons making journeys, a part of which was within the State of California and a part of which was without the State of California. There is no dispute as to taxes computed upon the receipts of the company from fares of passengers the whole of whose journeys were entirely within the boundaries of the state.

It has become customary, and it is conducive to brevity and clearness, to refer to receipts from passengers whose journeys began and ended within the state without crossing the state boundary lines as *intrastate* receipts; and for the same reasons to refer to receipts from passengers whose journeys crossed the state boundary lines as *interstate* receipts; and we follow custom in this respect. We have ventured to use two other abbreviated terms, which are possibly self-explanatory, namely: "interstate receipts within the state" and "interstate receipts without the state," to designate the division of interstate receipts prescribed by the California tax law for computing the tax on property used within the state but in interstate traffic.

There is no allegation that any part of the receipts from interstate travel collected for travel outside the state was used in computing the tax. The sole question in the cases before this court is as to the propriety of the inclusion in the concept of "travel within the state" of that proportionate part of an interstate journey which occurs within the state; that

is, of that part of such a journey which is made between a point within the state and the state boundary line when the point of destination is beyond the state, or between the state boundary line and a point within the state, when the initial point of the journey was without the state.

DESCRIPTION OF METHOD OF ASSESSMENT OF THE TAX.

Under section 14, article XIII of the constitution the state levied, and the Board of Equalization assessed a tax on the

> "franchises, * * * rolling stock * * * and other property * * * used exclusively in the operation of its business in"

the State of California

> "equal to the percentage"

fixed by law

> "upon the gross receipts from operation of that company *within* the state;"

but not on *all* gross receipts nor on *any* gross receipts from business *without* the state. Since the Pullman Company, like other companies, operates both within and without the state, the law provides a definite procedure for the division of interstate receipts, as a basis for the computation. The constitution and the

statute both require that the board shall take into account

> "all receipts on business beginning and ending within"

the state,

> "*and a proportion,* based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into or out of this state."

The actual procedure, followed in the assessment for the determination of that part of the receipts from interstate travel which is to be included in the computation, may be illustrated by an assumed case, in which the figures used are round numbers approximately like some of the actual instances. Let us assume that a passenger travels from Oakland, California, to Chicago, Illinois, and that he pays for his berth and travel in the Pullman car $13. If the distance from Oakland to Chicago is 2000 miles, and from Oakland to the state line, near Truckee, is 200 miles, then the mileage proportion of the trip in California is two hundred two-thousandths, or one-tenth. That proportion, or one-tenth of $13, is attributable to travel within the state. Thus, the gross receipts in this case to be included in the computation of the tax would be $1.30, and not the whole $13. If there were in all 100,000 such passengers carried between Oakland and Chicago in

a year, the tax would be computed on one-tenth of $1,300,000, or on $130,000. No better way can be suggested for determining the proportion of the franchises and property used in the state in interstate commerce.

It is not in the evidence, nor can we discover that it was ever claimed by the appellant, that the tax was ever computed upon the gross receipts from *all* business passing through, into or out of the state. Quite the reverse; it is in the evidence, it is the law, and is admitted in the complaint that only a part (and that the part attributable to travel in the state), of appellant's interstate receipts was included.

THE FINDINGS.

If the tax is found to be a tax on property and not on the gross receipts as such; if the tax is found not to be a tax on interstate earnings as such, or a tax on commerce between the states, or a burden on such commerce or the conduct of such commerce; if it is found that the tax is not on income as such and does not deprive plaintiff of property without due process; if it is found that plaintiff is not deprived of the right to do interstate business for nonpayment of the tax, then Finding No. 2 is correct; and if it is found that plaintiff has a monopoly in its business, and that the declaration of the legislature hereinafter mentioned is true, then Finding No. 3 is correct.

PLEADINGS AND PROOF.

Before entering upon our discussion of the law, evidence and history of this case, however, we call the court's attention to the fact that the complaints filed by plaintiff make no mention or issue concerning the actual, estimated or speculative value, or the location of, plaintiff's property involved in the tax, and that no charge of over-valuation of plaintiff's property, or fraud in ascertaining its value, or the inclusion of property not within the state is to be found in the complaint. Hence, no situation such as was considered in *Fargo* vs. *Hart*, 193 U. S. 490, is before us.

Nevertheless, appellant endeavored at the trial to lug in figures bearing upon the value of its property and argue the question of valuation, though all such evidence was introduced over defendant's objection that it was not pertinent to the issues of the case, and was undoubtedly considered as irrelevant and immaterial by the court.

ARGUMENT.

Statement and Answer to Appellant's Points.

Plaintiff-in-error in its brief in the Supreme Court of California summed up its contentions under three numbered paragraphs as follows:

APPELLANT'S FIRST CONTENTION.

> "The state can not tax gross receipts from interstate commerce."

Our position is that the tax sued for is part of a tax on the property used in California, computed at certain percentages of the gross receipts from business within the State of California. No tax at all is levied on the gross receipts, and in the computation only such parts of the gross receipts from interstate business as are interstate receipts within the state and are properly and reasonably attributable to the use of property within the state in such business are included. In the words of the constitution the tax is

> "in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided."

The exception refers to a so-called deficiency tax, or emergency tax, never yet levied, which, if levied, would fall alike on all property whether ordinarily taxable solely for state purposes, or ordinarily solely for local purposes.

APPELLANT'S SECOND CONTENTION.

"A tax upon property measured by gross receipts must not exceed a fair equivalent of a tax on the property by the ordinary means of taxation. If a tax so measured is confined to receipts from local business wholly within the state, the question is purely one for the state to determine, subject only to the question of discrimination and of the denial of equal protection of the law."

Our position is that without admitting that the tax to be legal must be so limited as counsel claim, we assert that *the tax in question is in no sense whatsoever excessive.* The state legislature, and its advisors, and the administrative officers to whom enforcement of state taxation is committed by law, used every effort, exercised the best judgment they had, and obtained the best advice and information available, as we shall hereinafter demonstrate, to satisfy themselves that the taxes to be levied and assessed were fair and equitable in amount as compared with other taxes, and especially as compared with the taxes paid by property owners of all other classes of property in the state. There is every evidence in the record that no pains were spared to be fair and just, and there is not a particle of evidence of an intent, or even of a remote wish, to discriminate against the Pullman Company, or, for that matter, against any other taxpayer. The tax in question is both fair and equitable. Moreover, under decisions we hereinafter cite, this court has ruled that in computing such a

tax as we have before us a proper proportion of interstate reecipts attributable to travel within a state may be included with intrastate receipts.

APPELLANT'S THIRD CONTENTION.

> "If the state imposes a tax upon gross receipts, any portion of which is derived from interstate commerce, calling it a tax upon property (which we do not concede a state has the right to do) *the burden is on the state to make clear its right to tax the forbidden subject of interstate commerce* and the receipts therefrom." (Italics are in original.)

Our position is that the tax is not upon gross receipts, but is a *bona fide tax* on property.

San Francisco vs. *Pacific Tel. and Tel. Co.,* 166 Cal. 244;

Lake Tahoe Railway and Transportation Co. vs. *Roberts,* 168 Cal. 551;

Pacific Gas and Electric Co. vs. *Roberts,* 168 Cal. 420;

County of San Bernardino vs. *State Board of Equalization,* 172 Cal. 76;

Southern Pacific Co. vs. *Levee District No. 1,* 172 Cal. 354;

Pacific Gas and Electric Co. vs. *Roberts,* 176 Cal. 183.

In fact, the Supreme Court of California has never expressed any doubt that the character of the tax is that of a property tax.

Thus, in

San Francisco vs. *Pacific Tel. and Tel. Co.*, 166 Cal. 248,

the court said:

> "Under the old system, the property and franchise of the corporation above referred to were taxed for both state and local purposes. The amendment creates a new mode of taxing *such property and franchises*, and appropriates the revenue so raised to state purposes solely."

Moreover, since the Supreme Court of the United States has repeatedly affirmed the right of a state to levy a tax on property used within its confines by carriers engaged in interstate commerce and to measure that tax, or compute and determine the amount and value of the property used within the state, by the gross receipts from business done within the state, including that part of gross receipts from interstate business which was earned within the state; and since the tax in question follows both the spirit and the letter of the law as expounded by the United States Supreme Court, *there is no tax on any forbidden subject*. It follows, therefore, that there is no such burden of proof as counsel would load upon us. Even if the circumstances were different, the burden of proof is not upon the state.

REVIEW AND APPLICATION OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

CONSTITUTION EMBODIES LANGUAGE OF THE SUPREME COURT OF THE UNITED STATES.

We preface a brief review of the two lines of decisions by the Supreme Court of the United States with reference to the right of the states to tax carriers engaged in interstate commerce, and to the methods they may use, by citation of a decision by that court in a case exactly parallel to the one now before the court.

The case to which we refer is

Wisconsin and Michigan Ry. Co. vs. *Powers*, 191 U. S. 379.

We cite and quote from this decision thus early in our brief and somehow in advance of our main analysis of the law for the reason that it was decided in *1903*—prior to the inauguration of the labors of our State Tax Commission—was before the commission and considered by it (see *report*, Appendix p. 201), and the text of the decision by Mr. Justice Holmes was apparently before the commission when our constitutional amendment was drafted. The latter fact is clear upon comparing the language of the proposed amendment with the text of the decision. The conclusion is, therefore, inevitable that the commission was providing a method of levying a tax

upon the property of interstate carriers that had met with the unanimous approval of that court.

The action in the *Powers* case was brought to enjoin the Auditor General of Michigan from collecting a tax on the ground that the law imposing the tax was contrary to the constitution of the United States as impairing the obligation of contracts and *interfering with interstate commerce*. The state statute thus atacked levied a

> "specific tax upon the property and business of every railroad corporation operated within the state"

and enacted that

> "when the railroad lies partly within and partly without this state, *prima facie*, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this state, such proportion of the income of said company arising from the interstate business as the length of the road over which said interstate business is carried in this state bears to the entire length of the road over which said interstate business is carried."

This was the law that plaintiff in the *Powers* case said was unconstitutional, but the court, with almost impatient brevity, brushed aside the attack thus:

> "We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the

> tax is a tax on 'the property and business of such railroad corporation, operated within the state,' computed upon certain percentages of gross income. The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine* vs. *Grand Trunk Railway Co.*, 142 U. S. 217, 228. See also *Western Union Telegraph Co.* vs. *Taggart*, 163 U. S. 1. Decree affirmed."

Not only did our State Tax Commission have this definite ruling of the United States Supreme Court before it while it was devising our state system, but later on it also had the affirmative announcement by that same court in 1907 that the rule approved by it in the *Powers* case meant just what it said.

Thus, in

> *Galveston, Harrisburg, etc. Ry.* vs. *Texas*, 210 U. S. 217,

the court, at page 225, said:

> "So it has been held that a tax on the property and business of a railroad operated within the state might be estimated *prima facie* by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried. *Wisconsin and Michigan Ry. Co.* vs. *Powers*, 191 U. S. 379."

As we have said, the commission of experts and lawyers who in the years from 1905-1910 prepared,

by direction of the legislature, the constitutional amendment upon which the California tax rests, had before them at the inception of their work this decision in the *Powers* case, then the latest word from the United States Supreme Court upon the subject. That they consciously and deliberately followed that decision is shown by the language used in drafting the amendment to the

Constitution, Art. XIII, Sec. 14, par. (*a*):

> "All railroad companies * * * all sleeping car companies * * * operating upon the railroads in this state; * * * shall annually pay to the state a tax upon their franchises * * * rolling stock * * * and other property, or any part thereof used exclusively in the operation of their business in this state, *computed* as follows: Said tax shall be equal to the *percentages* hereinafter fixed *upon the gross receipts* from operation of such companies * * * *within this state.*" (We have italicized the words taken from the decision.)

What was meant by receipts from business "within the state" was further defined by our commission in precisely the manner the court had in mind in this decision.

THE TWO FUNDAMENTAL CONSTITUTIONAL POINTS.

There are always two principles of constitutional law to be taken into account when a state proposes to levy a tax upon an interstate carrier. *First*, there is the provision of the federal constitution that Congress alone has the power "to regulate commerce

with foreign nations, and *among the several states,* and with the Indian tribes." (Sec. 8, Art. I, *U. S. Constitution.*) This provision has been construed to prohibit the states from restraining or restricting by discriminatory taxation the commerce between the states. *Second*, there is the unrestricted power of the states to tax all persons and their property coming under the jurisdiction of a state and enjoying the protection of state law. This power is admittedly essential to the very existence of the several commonwealths as sovereignties. It is original and inherent and may not be taken away by Congress.

The two principles are not, however, in conflict, as some assert, but are parallel. Even if there were no prohibitions in the federal constitution, as, of course, there are, a customs duty levied by a state would be forbidden by the above quoted provision of the federal constitution. On the other hand, it is so clear that the point has never been raised that a state or local tax on a railroad terminal warehouse and the land upon which it stands owned by a carrier engaged in interstate commerce and used solely in connection with such commerce would not be a prohibited interference with or regulation of interstate commerce. Between these two distinct types of taxes lies many others, and sometimes a tax has been levied which came so near the boundary line between the permitted and the forbidden that the court has had difficulty in determining on which side of the line it fell.

TAXES LEVIED BY STATES SOMETIMES DIFFICULT TO CLASSIFY.

The court has clearly expressed its perplexities in the following language taken from

United States Express Co. vs. *State of Minnesota,* 223 U. S. 335:

> "The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in *Galveston, Harrisburg and San Antonio Ry. Co.* vs. *Texas.*"

The *Galveston* case (210 U. S. 217) involved the legality of a gross receipts tax levied *in addition* to an *ad valorem* tax, which latter tax fully covered all the property used. Our California tax is an "in lieu" tax, that is, it is a tax in lieu of *ad valorem* taxes.

THE STATE MAY TAX INTANGIBLE AS WELL AS TANGIBLE PROPERTY.

There never has been any question about the power of a state to tax the property found within its confines of an interstate carrier to the same extent as other property is taxed.

Railroad Co. vs. *Peniston,* 18 Wallace 5;

Pullman's Palace Car Co. vs. *Pennsylvania,* 141 U. S. 18;

American Refrigerating Co. vs. *Hall,* 174 U. S. 70;

Union Refrigerating Co. vs. *Lynch,* 177 U. S. 149.

Nor has there been any question as to the power of the state so to tax *the intangible property* as well as the tangible property of carriers engaged in interstate commerce.

Central Pacific R. R. Co. vs. *California,* 162 U. S. 91;
Adams Express Co. vs. *Ohio,* 165 U. S. 194; *s. c.,* 166 U. S. 185;
Union Tank Line Co. vs. *Wright,* 249 U. S. 275.

The allocation of intangible property to a state for purposes of taxation is also permitted.

Henderson Bridge Co. vs. *Kentucky,* 166 U. S. 150;
Adams Express Co. vs. *Kentucky,* 166 U. S. 171;
Union Tank Line Co. vs. *Wright* (*supra*).

Physical property has a physical situs; intangible property by its very nature can have only a legal or constructive situs. Intangible property is used, and hence has a legal situs where the business is done, for it is a correlative of business, and arises only in a going concern.

PULLMAN COMPANY USES INTANGIBLE PROPERTY IN CALIFORNIA.

By implication, without distinctly so asserting, counsel for appellant would have the court infer that the only property the Pullman Company uses in California is its rolling stock and other physical or tangible property.

We pass over without comment the light esteem in which counsel for this great company seem to hold some twenty acres of costly townsite land largely covered with great repair shops all equipped with the most up-to-date and expensive machinery and facilities. But we can not so easily ignore the denial, by silence and omission, of the existence of a large amount of intangible property; property of the kind sometimes called "the value as a going concern," sometimes called the "corporate excess," and under the law of California called "the franchise."

Miller & Lux vs. *Richardson*, 59 Cal. Dec. 121.

THE PRINCIPLE OF UNITY IN USE.

In

Adams Express Co. vs. *Ohio*, 165 U. S. 194,

the court said that it was "unity in use" which enabled $23,400 worth of horses, wagons, safes, and so on, in the state to produce $275,446 in a single year. There may be a difference between the Pullman Company and an express company as to the proportions in which tangible and intangible property enter into the respective property totals. It is a difference of degree only, not of kind, and it is idle to deny that a car company, and especially the Pullman Company, with such a huge volume of business *and with a complete monopoly in its line of business in California* (Tr. 68), has no property of value save its cars and "some other" property, all physical.

The company has both physical and intangible property and uses both in California under the protection of the laws of the state. The intangible property is of very great value. That intangible property may be taxed by the state as well as the tangible. It is inseparable from the business done and out of which it arises and goes where the cars go. The principle of unity of use determines the situs of the intangible property. In the *Ohio Express Company* cases (see particularly *Adams Express Co.* vs. *Ohio*, 165 U. S. 194), Chief Justice Fuller set forth the principle with exceeding clearness when he said (p. 221):

> "No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph and sleeping car companies, to roadbed, rails and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others."

Again, in the same case, on rehearing, as reported in 166 U. S. 185, the court, at pages 224–5, said:

> "It is also true that a corporation is, for purposes of jurisdiction in the federal courts, conclusively presumed to be a citizezn of the state

which created it, but it does not follow therefrom that its franchise to be is for all purposes to be regarded as confined to that state. For the transaction of its business it goes into various states, and wherever it goes as a corporation it carries with it that franchise to be. But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done. * * *

In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no finespun theories about situs should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

PROPER METHOD OF APPORTIONMENT OR ALLOCATION OF PROPERTY.

In an endeavor to tax all the property, tangible and intangible, used by an interstate carrier within their confines, states have been permitted to resort to several methods, all of which are based on the principle of unity in use. Thus, they have used the so-called "unit rule" and have made a valuation of

the entire property of the carrier as a "system" and have levied the tax on that proportion of the property which the mileage in the state bears to the total mileage operated. Or they have made the apportionment on the basis of business done. This has been approved in

State Railroad Tax Case, 92 U. S. 575;
Western Union Tel. Co. vs. *Taggart*, 163 U. S. 1;
Adams Express Co. vs. *Ohio*, 165 U. S. 194.

When apportionment is made on the basis of business done, gross receipts are often used as a measure of business. When it is proposed to make and apportion an ad valorem assessment by reference to gross receipts, two steps are necessary: one is to value the entire system, the second step is to ascertain the gross receipts within the state. The last is obviously the ultimate determination. Hence, it has frequently occurred that the states have to cut out the first step as a formal procedure and have computed the tax directly on gross receipts.

The California statute classifies certain properties, segregated for state taxation, and places them in groups or classes for the purpose of more equitable taxation. Thus the constitution makes separate classes of: (*a*) railroads, street railways; (*b*) car companies; (*c*) express companies; (*d*) telegraph and telephone companies; (*e*) gas and electric companies; (*f*) insurance companies; (*g*) banks; and (*h*) franchises not included above. Each of these is

taxed in a manner designed to bring about equality of burden between them.

The power of the state to so classify property for purposes of taxation has been sustained so many times and so distinctly that it seems almost unnecessary to advert to the decisions that lay down the right of exercising such power. In

Kentucky Railroad Tax Cases, 115 U. S. 331,

the court, on page 339, said:

> "The right to classify railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the constitution of the state in its legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property can not be considered as a denial of the equal protection of the laws."

Similarly:

Home Insurance Co. vs. *New York State,* 134 U. S. 594, especially p. 606;

State Railroad Tax Cases, 92 U. S. 575, p. 611, following;

Pacific Express Co. vs. *Seibert,* 142 U. S. 339, p. 351;

Bells Gap Railroad vs. *Pennsylvania,* 134 U. S. 232, 237;
Western Union Tel. Co. vs. *Indiana,* 165 U. S. 304.

From the foregoing it would appear to be indisputable that for the purposes of taxation a state may classify properties, subject such properties to different methods of taxation, and impose upon different classes different rates of taxation. But before taking up the matter of imposing different rates upon different classes of property, we desire to call the court's attention to one case concerning authority of the state to segregate certain property from the mass of property within its borders and reserve such property so segregated for its sole benefit so far as revenue derived therefrom by the medium of taxation is concerned. We quote as follows from the case of

Michigan Central R. R. Co. vs. *Powers,* 201 U. S. 245.

Starting at page 293, the court says:

" * * * it was not designed by the Fourteenth Amendment to the constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an ironclad rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as

against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice. (Citing cases.)"

(Page 299.) "Unless there be some specific provision in the state constitution compelling other action, the state may treat its entire territory as composing but a single taxing district, and deal with all property as within the district and subject to taxation accordingly. There is no magic in county organization, no inherent necessity of dividing the state into small taxing districts. Frequently railroads are separated from other property, assessed by a state board, and the taxes collected therefrom applied to the general purposes of the state. Sometimes, it is true, a portion of the taxes thus collected is distributed pro rata to the counties along the lines of the roads, but the power of the state to apply the taxes from railroad property to only state purposes can not be doubted, and is often exercised. If it may take all the taxes received from railroad property and apply it to general state purposes, and, to that extent, relieve counties in which there is no railroad property from their contribution to the support of the state, it has equal power to say that the average rate of taxation shall be determined, not by the rates upon other property in the immediate localities in which the railroads are located, but by those upon all property wherever situated in the state."

(Page 300.) "Further, it must be borne in mind that the taxes collected from railroads in Michigan are, by section 16 of the act, applicable

to state purposes, and while it is doubtless true that the appropriation of these taxes to state purposes diminishes the tax burden which will fall upon other property, yet the case presented is one in which the legislature, taking a class of property, imposes upon it through state authorities a state tax for strictly state purposes. That, so far as the restraints of the federal constitution are concerned, it is within the power of a state to separate a particular class of property, subject it to assessment and taxation in a mode and at a rate different from that imposed upon other property, and apply the proceeds to state rather than to local purposes is not open to question. *Kentucky Railroad Tax Cases,* 115 U. S. 321, * * *"

(Page 301.) "By the legislation of Kentucky railroad companies and their property were separated from other property, subjected to different means and methods for purposes of taxation, and upon this the court said (p. 337):

'But there is nothing in the constitution of Kentucky that requires taxes to be levied by uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' See also *Pittsburgh Railroad Company* vs. *Backus,* 154 U. S. 421; *Florida*

Central etc. Railroad Company vs. *Reynolds,* 183 U. S. 471; *Coulter* vs. *Louisville and Nashville Railroad,* 196 U. S. 599.

That no provision is made for a general equalization of railroad with other property in the state does not vitiate the assessment. See *Cummings* vs. *National Bank,* 101 U. S. 153, in which the question was distinctly presented and determined, the court saying (p. 161):

'While it may be true that this system of submitting the different kinds of property subject to taxation to different boards of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them; and a law can not be held unconstitutional because, while its just interpretation is consistent with the constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful while the statute is valid.' "

DIFFERING RATES.

In support of the proposition that the state is authorized to impose upon different classes of property within its border different rates of taxation, and that in so doing it is not subject to criticism, nor can the tax be attacked upon the ground of discrimination so long as property within each class has imposed upon it the same rate as all other property

within its respective class, we cite the following at page 302 of the case of

Michigan Central R. R. vs. *Powers,* 201 U. S. 245:

> "It may also be said that a legislature is not bound to impose the same rate of tax upon one class of property that it does upon another. As it may exempt all of one class so it may impose a different rate of taxation. It is sufficient if all of the same class are subjected to the same rate and that the tax is administered impartially upon them."

In

Michigan Railroad Tax Cases, 138 Fed. 223,

the court, at page 240, said:

> "The Fourteenth Amendment to the federal constitution permits the legislative power of the state to classify property for the purpose of taxation, according to its use by railroad companies which are given these powers and privileges. It is not necessary that all railroad property be taxed under one method and at the same rate, but it is only necessary that all property belonging to railroads in the same class be taxed alike."

This holding was quoted with approval by the U. S. Supreme Court in

Michigan Cent. R. R. vs. *Powers,* 201 U. S. 245.

As early as

Delaware Railroad Tax Case, 18 Wall. 206,

the same doctrine was announced by the Supreme Court of the United States, at page 231, in the following language:

> "The manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

In this same connection we refer to the case of

Home Insurance Co. vs. *New York State, supra.*

From the foregoing it would appear to be entirely within the power of the state to classify various properties, to provide different methods of valuing properties, to separate and reserve unto itself for its own revenue certain properties and to impose upon different classes of properties different rates of taxes, and that such rates may be fixed without regard to rates imposed on other classes of property or upon property taxed for other purposes by other tax authorities.

Thus, though, as we shall hereinafter show, the Tax Commission in its reports displayed a commendable spirit of equalizing the burden of taxation on all properties in the state, including appellant's

and endeavored in arriving at the tax to be imposed upon appellant's property to make that tax fairly comparable with the taxes imposed by local authorities upon the classes of property released from state taxation, no such legal duty was required of the commission, and no such equation in taxation is demanded by the law as between different classes.

The First Line of Cases Dealing with Gross Receipt Taxes.

INTERSTATE COMMERCE DISCRIMINATED AGAINST.

This brings us to the first line of cases involving taxes distinctly related to gross receipts. We call them the "first line" because they are for the most part older, but chronology is not important.

In this earlier line of cases the states levied directly on the gross receipts without proper apportionment of interstate receipts. They saw express messengers passing to and fro in charge of parcels, employees of an express company, earning rich profits with but little visible property; they saw telegraph wires humming with messages paid for by tolls; cars passing through loaded with passengers, now within, now without the states; and steamers coming and going. There, as they saw it, was earning power, business done within the state, and little property of a physical character. Some states tried to reach these businesses by

license tax. But such license taxes so obviously presupposed the right to regulate interstate commerce that they fell at once under adverse decisions. Other states tried taxing the freight, messages and passengers, and again, as was proper, met with judicial refusal to sanction.

Other states then turned to the taxation of the gross receipts, *per se*. At first, as in

The State Tax Gross Receipts, 15 Wallace 284,

the court approved. In that case the tax was not heavy and was a substitute for other taxes. But soon there came before the court other taxes which were not so simple, and which ventured too close to or over the line so clearly marked out subsequently in

United States Express Co. vs. *Minnesota*, 223 U. S. 335.

In one of these cases (*Fargo* vs. *Michigan*, 121 U. S. 230), a tax on a New York car company engaged solely in interstate business in Michigan was adjudged illegal. This case is easily differentiated from cases decided later and also from our present case, in many points, the most important being that the tax imposed on the gross receipts in *Fargo* vs. *Michigan* was not a property tax at all, but for the privilege of doing business in the exercise of its corporate franchise.

Then came the case of a steamship company,

Philadelphia Steamship Co. vs. *Pennsylvania*, 122 U. S. 326,

engaged in ocean transportation. Obviously the gross receipts earned and business done on the ocean could be considered under state control only by a stretch of language. None of these receipts were from business done within the state.

There are other cases in this line, but we need not weary the court with their review; they are all cited and relied upon by appellant, but an examination of this line of cases discloses that every one, like the two above, turned upon a tax which aimed directly at interstate commerce as such.

In all these cases *the facts involved* demonstrate a clear interference with and burden upon interstate commerce, exceeding the powers of the state to tax property and persons distinctly within the state jurisdiction.

The Second Line of Cases Dealing with Gross Receipt Taxes.

INTERSTATE COMMERCE NOT DISCRIMINATINGLY BURDENED.

There is a second line of cases in which the use of gross receipts to compute a tax on the "property and business" in lieu of all other taxes has been regularly and repeatedly sanctioned.

The court is quite clear that these cases do not overrule those in the first line, and also that the first line is in no way in conflict therewith. That no conflict exists between the two lines of cases is specifically pointed out in many of the cases in the second, or later, line. Thus, in

Maine vs. *Grand Trunk Ry. Co.*, 142 U. S. 217, 230,

the court said:

> "The case of *Philadelphia and Southern Steamship Co.* vs. *Pennsylvania*, 122 U. S. 326, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the state, derived from the transportation of persons and property between different states and to and from foreign countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it."

This second line of cases involves taxes held to be in effect taxes on the property, although in form they may appear different.

The first of this line, or the one at least to which the court always turns back as the first clear case when deciding subsequent tax cases of the same sort, is

Maine vs. *Grand Trunk Ry. Co., supra.*

It will be noted that this case involved a Canadian corporation, and more or less of foreign commerce, as well as ordinary interstate commerce. Moreover, the basis of apportionment of interstate (and international) gross receipts was the *road mileage* basis, which, as we shall show, is not nearly so equitable, all things considered, as the *business mileage* used in California. The tax is described in the case, so far as the form is of immediate bearing for us, as follows (p. 220):

> "When a railroad lies partly within and partly without the state, or is operated as a part of a line or system extending beyond the state, the tax shall be equal to the same proportion of the gross receipts in the state, as herein provided, and its amount determined as follows: the gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the state, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in this state shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within this state."

In its decision the court said:

> "The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, * * *. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the

imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the state as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred.

* * * * * * *

The purpose of the act was to fix the amount of the tax each year upon the franchise or business of the corporation by the extent of dividends upon its capital stock, or, where there were no dividends, according to the actual value of the capital stock during the year. * * * It was held that the tax was not upon the capital stock of the company nor upon any bonds of the United States composing a part of that stock, but upon the corporate franchise or business of the company, and

that reference was only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year. And the court said: 'The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows.' "

The tax was sustained and the court called special attention to the fact that *intangible as well as tangible property* may be taxed by the state, using the following language:

> "The tax * * * is * * * upon the defendant corporation for the privilege of exercising its franchises within the state of Maine."

The same principle, namely, the right of a state to tax the property, both tangible and intangible, computing the tax thereon at a percentage of gross receipts and including the *interstate receipts* within the state, is reaffirmed in

> *Erie R. R. Co.* vs. *Pennsylvania*, 158 U. S. 431;
> *Wisconsin and Michigan Ry. Co.* vs. *Powers*, 191 U. S. 379.

The principles are nowhere more clearly enunciated than in

> *United States Express Co.* vs. *State of Minnesota*, 223 U. S. 335.

After giving a list of cases showing that "state laws may not burden interstate commerce," the court said (p. 343):

"While we have no disposition to detract from the authority of these decisions, this court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the state by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce.

* * * * * * *

The resort to the gross receipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation, and thus measuring the tax which was held to be within the power of the state. (Citing *Wisconsin and Michigan Ry. Co.* vs. *Powers*, 191 U. S. 379, on same point.)

* * * * * * *

The right of the state to tax property, although it is used in interstate commerce, *is thoroughly* well settled. (Citing *Postal Tel. Cable Co.* vs. *Adams*, 155 U. S. 688; *Pullman's Palace Car Co.* vs. *Pennsylvania*, 141 U. S. 18; *Ficklen* vs. *Taxing Dist.*, 145 U. S. 1, 22.)

* * * * * * *

The statute itself provides that the assessment under it 'shall be in lieu of all taxes upon its property.' In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the state to tax the property

of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all. In this connection, the language of Mr. Justice Peckham in *McHenry* vs. *Alford*, 168 U. S. 651, 671, while it was not necessary to the decision of the case, is nevertheless apposite:

'When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings.'

The tax in the present case is not like those held invalid in the *Galveston* case and the *Oklahoma* case, being in addition to other state taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation, seeking to reach the value of the property of such companies in the state, measured by the receipts from business done within the state. The statute was not aimed exclusively at the avails of interstate commerce (*Philadelphia Steamship Co.* vs. *Pennsylvania, supra*), but, as in the *Maine* case, was an attempt to measure the amount of tax within the admitted power of the state by income derived, in part, from the conduct of interstate commerce. The

property of express companies, being much of it of an intangible character, is difficult to reach and properly assess for taxation. This difficulty led this court in *Adams Express Co.* vs. *Ohio,* 165 U. S. 194, *s. c.,* 166 U. S. 185, to sustain a tax upon the property of an express company, which property was considered a part of one-money-earning organization extending through many states.

As this court said in *Postal Tel. Co.* vs. *Adams,* 155 U. S. 688–696, 697:

'Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution.'

We think the tax here in question comes within this principle. * * *

Upon the whole, we think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court,

> which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state."

In the Supreme Court of California appellant's brief made the bold assertion that *interstate receipts were not involved* in the *Minnesota Express* case, and predicated that assertion upon the mere fact that the express company taxed did not cross the state line in the conduct of its business, but at some point within the state delivered the freight, destined to a point outside the state, to another carrier that completed the interstate transaction. And for this reason appellant would endeavor to convince the court that an interstate shipment, accepted by a carrier operating only within the confines of the initial state, delivered by such carrier to a connecting line, transported on a "through rate" and "through waybill" is in fact only a local shipment in so far as the initial carrier is concerned and that the earnings of the local carrier in such transaction is entirely disconnected from earnings in interstate commerce! And appellant cited in support of its position *one paragraph* from the decision of the Supreme Court of the State of Minnesota in the *Express Company* case as follows (131 N. W. 491):

> "2. So-called 'interstate transfer' business. Carriage of shipments from points in this state to points without this state is undoubtedly interstate commerce, though the carriage without the state is wholly by connecting companies. There

is no doubt that it was the intention of the legislature, as expressed in the act, to include this class of earnings within the state in the gross receipts upon which the tax is based. They are earnings from business done 'between points in this state.' The provision that there shall be included by the company in its return 'its proportion of gross receipts for business done by such company within this state in connection with other companies' is not, we think, entirely colorless, but bears out the conclusion that the act shows an intent that the state shall be entitled to include such earnings in figuring the taxes to be paid by the company."

The immediately succeeding paragraph of the state court's decision reads as follows (p. 491):

> "The question is whether the legislature had power to include earnings from such shipments. If the gross earnings tax law is to be construed as a tax upon gross earnings, admittedly a tax upon the earnings from interstate shipments is an interference with interstate commerce; but if such law does not authorize a tax upon gross earnings, if it is a tax upon the property of the corporation within the state, its gross earnings within the state being merely a measure or method of arriving at the value of its property for taxation, it is equally clear that there is no interference with interstate commerce, and the legislature has not acted beyond its power."

If this statement by the Supreme Court of Minnesota does not plainly demonstrate that the court was

considering the tax involved from the standpoint that interstate receipts were included in the "measure or method of arriving at the value of its property," we confess our inability to understand the decision. The fact that the court found the tax to be a property tax was what saved the law from being "admittedly a tax upon the earnings from interstate shipments."

Further along in the same decision, the court says (p. 491):

> "The decisions of this court, if followed, lead clearly to the conclusion that the law in question provides for a property tax, and is not, therefore, a tax upon interstate commerce when applied to the receipts for business within the state, though the shipments come from or go to a point outside the state. We do not feel justified in departing from the doctrine of these decisions because of the recent decisions of the United States Supreme Court relied on by defendant. It is by no means clear that the court has rendered any decision on the subject that is contrary to those of this court. The earlier cases established the principle that a tax upon the earnings from interstate commerce is an interference with such commerce, but do not hold that a gross earnings system of taxation can not be construed as a tax upon property. (Citing cases.)"

Furthermore, when this court considered the *Minnesota Express* case *and announced the law with respect to what gross receipts could be included* in

such system of taxation, *this was the way the problem was then stated*: (223 U. S. 335.)

> "As to the transportation * * * from points within the state to points without the state, from points without the state to points within the state, and from points without the state to points without the state, passing through the state, the transportation outside of the state being performed by connecting companies, the Supreme Court of Minnesota held that it was the intention of the legislature, in the statute under consideration, to include the earnings from these classes within the state in the gross receipts upon which the tax is is based. This construction of the statute is binding upon us.
>
> The transportation was made upon a through rate and through bill of lading, and, it is stipulated, consisted of a single transportation transaction, commencing with the delivery by the shipper to the express company and continuing until the delivery of the shipment to the consignee at the ultimate destination. This was clearly interstate commerce, and the federal question made in this connection is: Is this tax a burden upon interstate commerce, and, therefore, an infraction of the exclusive power of Congress, under the constitution, to regulate commerce among the states?"

It is the nature of the shipment, not the distance that a particular carrier may handle it, that classifies a shipment as interstate or intrastate, and an earning by a state carrier from an interstate shipment is

not transformed into a local earning by the initial carrier merely because the initial carrier engaged in the transportation operates entirely within the confines of the state.

Again in:

Johnson vs. *Wells Fargo & Co.*, 239 U. S. 234,

we find this statement:

> "Another case greatly relied upon by appellant is *United States Express Co.* vs. *Minnesota*, 223 U. S. 335, in which a statute of the State of Minnesota which undertook to tax express companies upon their property employed within the state, measured by the gross receipts within the state, from which certain deductions were made, was attacked as in violation of the commerce clause of the federal constitution, *as the receipts which were the basis of the tax were derived in part from interstate transportation.* In that case, the law was specifically authorized by the constitution of the state, as a means of reaching a proper valuation of the express companies' property within the state, in lieu of all other taxes. There was no contention in the case that the method used resulted in an excessive valuation. *The tax was sustained, as against the attack under the commerce clause, upon the ground that, so far as interstate commerce receipts were referred to, they were in part the measure of a tax within the legislative power of the state, and not in any just sense a burden upon interstate commerce.*" (Italics ours.)

That this court was neither deceiving itself nor being deceived as to the fact that that *interstate*

receipts were included and involved in the *Minnesota Express* case would also appear from an expression by that court in

Cudahy Packing Co. vs. *Minnesota,* 246 U. S. 450,

where in reviewing the *Express* case the court said (p. 454):

> "The other case (*U. S. Express Co.* vs. *Minnesota,* 223 U. S. 335) involved a tax in Minnesota of a designated per cent of the gross receipts of an express company from business, done in that state, the business being part local and partly interstate commerce."

The tax in the *Cudahy* case was sustained because this court agreed with the state court as to the nature of the tax. The conclusion thus approved is stated as follows (p. 454):

> "As before stated, the state court regards the tax as imposed in respect of the property rather than the earnings, and the same view seems to be taken by the legislature, for the Act of 1909 speaks of the tax as 'a tax upon its (the company's) property'; and the Act of 1911 says 'the value of such property (that used within the state) for purposes of taxation is to be determined' by reference to the gross earnings from mileage within the state. True, this local view is not conclusive on this court, but it can not be rejected unless it can be said to be ill!founded."

In

Barnes on Interstate Transportation, Sec. 33,

we read:

"Any carriage of goods which crosses a state line is interstate commerce and the fact that the transportation from one state to another is accomplished in whole or in part through the agency of independent and unrelated carriers up to and from the state line, does not affect the character of the transportation in this respect. For, whenever an article destined to a place without the state is shipped or started therefor, it becomes the subject of interstate commerce, and the carriers employed in the transportation thereof, although neither of them pass from one state to another, are subject as instrumentalities of such commerce, to national legislation and control.

A railroad company whose road lies entirely within the limits of a single state becomes subject to the Act to Regulate Commerce by participating a through movement of traffic from a point in another state to a point in the state within which it is located, although its own service is performed entirely within the latter state. And of course the same is true of a state road which becomes one of the members to a through route on a shipment from a point in another state, which passes through the state in which the road lies.

* * * * * * *

The importation into one state from another is the test of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from a commencement in one state to a prescribed destination in another is

a transaction of interstate commerce. Every carrier who transports such goods through any part of such continuous passage is engaged in interstate commerce, whether the goods are carried upon through bills of lading or are rebilled by the several carriers."

The text above quoted is sustained by voluminous authority, numerous cases by this court and the Interstate Commerce Commission being cited.

APPELLANT'S POSITION DEFINED AND ANALYZED.

In the Supreme Court of California plaintiff-in-error took the following position:

"The case at bar falls within the principle of the *Galveston* case, the *Oklahoma* case, *Fargo* vs. *Michigan*, 121 U. S. 230; the *Philadelphia and Southern Steamship* case, 122 U. S. 326, and not within the principle of the *Minnesota* cases. There are several distinctions between the *Minnesota Express* case and the case at bar, which we will now proceed to consider."

Here is appellant's position succinctly and definitely defined. By appellant's contention that the case at bar comes "within the principle of the *Galveston* case (*Galveston, Harrisburg and San Antonio Ry. Co.* vs. *Texas*, 210 U. S. 217), the *Oklahoma* case (*Leo Meyer as Auditor of Oklahoma* vs. *Wells Fargo & Co.*, 223 U. S. 298), *Fargo* vs. *Michigan*, 121 U. S. 230, and the *Philadelphia and Southern Steamship* case, 122 U. S. 326, and under these

decisions the tax should be declared illegal, because of similarity between these cases and the case at bar, we have the definite ground taken by appellant specified in terms. And from the further contention by appellant that the case at bar *does not* come within the principle of the *Minnesota* cases (*U. S. Express Co.* vs. *Minnesota*, 223 U. S. 335, and *Cudahy Packing Co.* vs. *Minnesota*, 246 U. S. 450), we have a tacit admission by appellant that if the case at bar does come within the principle of the *Minnesota* cases, the tax is legal.

Holding in mind the principles of the *Minnesota* cases we therefore proceed to an analysis of these cases upon which appellant relies.

The Galveston Case.
(210 U. S. 217.)

The statute in question imposed a tax upon railroads "equal to one per cent of their gross receipts" * * * "from every source whatever * * *." Not a word in the statute about this tax being a tax upon the property of the road—not a word to the effect that the tax is "in lieu" of property or other taxes. In fact, the attorneys for both plaintiff and defendant-in-error considered and characterized the tax as "an occupation tax," and it was conceded in the briefs and stated by the court "that another tax on the property of the railroad is upon a valuation of that property taken as a going concern" and that the tax in question "is merely an effort to reach the gross

receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.' "

For this reason the tax was declared illegal as a direct tax upon receipts from interstate commerce as such.

Where is the parallel to our case?

THE OKLAHOMA CASE.
(223 U. S. 298.)

The facts in this case and the reasons set forth for the illegality of the tax are so succinctly stated by the court that we quote therefrom:

> "The statute in question (March 10, 1910, Sess. Laws 1910, c. 44, p. 65) is entitled 'An act providing for the levy and collection of a gross revenue tax from public service corporations in this state' and from persons engaged in certain mining and similar occupations. By section 2 'Every corporation hereinafter named shall pay the state a gross revenue tax * * * which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such coporation equal to the per centum of the gross receipts hereinafter provided, if such public service corporation operate wholly within the state, and if such public service corporation operates partly within and partly without the state, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business;' with a

proviso for fixing a different proportion if it 'more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this state bear to its total gross receipts.' By section 3 the per centum to be paid by express companies (such as the plaintiff is), is three per cent of the gross receipts, and, 'for the purpose of determining the amount of such tax,' they are required to report under oath the gross receipts 'from every source whatsoever.'

The plaintiff's receipts are largely from commerce among the states, and it also receives large sums as income from investments in bonds and land all outside the State of Oklahoma. So that it is evident that if the tax is what it calls itself it is bad on the former ground, and that whatever it is it is bad on the latter. *Fargo* vs. *Hart,* 193 U. S. 490. In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the state, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the state to that outside. But we see no warrant for calling the tax a property tax. It is so similar to the Texas statute held bad in *Galveston, Harrisburg and San Antonio Ry. Co.* vs. *Texas,* 210 U. S. 217, as to show that, if one is not copied

from the other, they have a common source. It would be possible only by some extraordinary turn of ingenuity to sustain this after condemning that.

It was argued in some detail that taking into account the rest of the act and other statutes passed later at the same session this really was a property tax. But the scope and purport of the act, so far as it affects express companies, are too obvious to admit such a view. The tax is 'in addition to the taxes levied and collected upon an ad valorem basis.' Even if we read the words which follow without a comma, viz, 'upon the property and assets of such corporation,' as not qualifying those which immediately precede but as attempting to characterize the 'gross revenue tax' as a tax on such property and assets, nevertheless all the property and assets are the subject of the ad valorem taxes referred to. Therefore this tax can not be an attempt to reach the value of what is by the law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of *Maine* vs. *Grand Trunk Ry. Co.*, 142 U. S. 217, given in *Galveston, Harrisburg and San Antonio Ry. Co.* vs. *Texas*, 210 U. S. 217, 226, *Flint* vs. *Stone Tracy Co.*, 220 U. S. 107, 162–165, and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items. There is nothing sufficient to indicate such a limitation, and for the reasons given above on the authority of *Fargo* vs. *Hart*, 193 U. S. 490, it is plain that the gross receipts

from all sources could not have been used as a means for estimating the going value of the property in the state. We may add in this connection that this same requirement as to the total gross receipts shows that it is impossible to save the constitutionality of the act by construing it as referring only to the receipts from commerce wholly within the state."

Later, the court in

Cudahy Packing Co. vs. *Minnesota,* 246 U. S. 450,

in explaining the *Oklahoma* case, said:

"The former involved a tax in Oklahoma of a stated per cent of the gross receipts of an express company doing both a local and an interstate business in that state. The statute called the tax a 'gross revenue tax' and declared that it was to be 'in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets' of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the property of the company in the state was to be reached and valued in another way. * * *

The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the state."

Where is the parallel to our case?

FARGO *vs.* MICHIGAN.
(121 U. S. 230.)

This case involved a tax of two and one-half per cent upon the gross receipts of the Merchants Dispatch Transportation Company. All of the gross receipts of this company were earned in interstate commerce. The tax was an undisguised and open attempt to collect in the guise of taxation a percentage of the interstate earnings of the company without relation to the value of the property owned or operated by the company within the confines of the state.

Where is the parallel to our case?

THE PHILADELPHIA STEAMSHIP CASE.
(122 U. S. 326.)

This case involved a tax of eight-tenths of one per cent upon the gross receipts of a steamship company "derived from the transportation of persons and property by sea, between different states, and to and from foreign countries."

Not a word about the tax being a property tax on the steamships or office or warehouse buildings or wharves, or a tax "in lieu" of such a property tax upon its tangible and intangible properties engaged in the business. If the State of California attempted to tax the gross receipts of the ocean liners of the Matson Navigation Company earned in the transportation of passengers and freight

from San Francisco to Honolulu the *Pennsylvania Steamship* case might well be quoted, but where is the paralled to our case?

The reasons for the court's rulings in both *Fargo* vs. *Michigan* and the *Philadelphia Steamship Company* case are clearly stated and the difference between those cases and our case sharply drawn by the following quotation from the *Cudahy* case, *supra*:

> "In so far as the property constituting this car line is regularly or habitually used or employed in Minnesota it is within the taxing power of the state, although chiefly devoted or applied to interstate transportation. *Pullman's Car Co.* vs. *Pennsylvania*, 141 U. S. 18; *Adams Express Co.* vs. *Ohio*, 165 U. S. 194; *s. c.*, 166 U. S. 185; *American Refrigerator Co.* vs. *Hall*, 174 U. S. 70; *Union Refrigerator Co.* vs. *Lynch*, 177 U. S. 149. This is not questioned; but it is insisted that the tax imposed is not a property tax but one laid directly on the gross earnings. Of course if it is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void. *Fargo* vs. *Michigan*, 121 U. S. 230; *Philadelphia and Southern Steamship Co.* vs. *Pennsylvania*, 122 U. S. 230; *Galveston, Harrisburg and San Antonio Ry. Co.* vs. *Texas*, 210 U. S. 217. On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the

value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, 'by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack' as restraining or burdening such commerce."

Need we argue further to demonstrate the wide divergence between these cases upon which appellant rests its cause and the California law that imposes a tax upon appellant's property solely for state purposes, exempts the same property from taxation for all other purposes and adverts to a portion only of the earnings as "an index or measure of the value" of the "franchises, roadways, roadbeds, rolling stock * * * and other property, or any part thereof used exclusively in the operation of their business in this state" by railroad companies, "sleeping car, dining car, drawing room car and palace car companies" and provides for reimbursing all counties and districts from the state funds for the loss of revenue sustained "by the withdrawal of railroad property from county taxation" and to pay such reimbursement on account of "the withdrawal from local taxation of property taxed for state purposes only." (Const., Sub. (*f*), Sec. 14,

Art. XIII. See also, Stats. 1911, Chap. 601, and Stats. 1913, Chap. 533. Appendix pp. 168–9.)

In view of counsel's repeated assertions that the actual value of appellant's properties in California have never been taken into consideration by the tax authorities, and that a slice of appellant's gross receipts has been the only objective, we feel it incumbent on us to call from the record the following witness:

In the 1906 report of the commission (pages 197, 199 and 200, Appendix, pp. 179 and 181), the following appears:

"EARNINGS OF CAR COMPANIES.

As to the earnings of these companies very little original information is available. The Pullman Company positively declared itself unable to furnish a statement of its earnings in California, as its accounts are not kept with reference to state boundary lines. It has never rendered such an account to the State Board of Equalization. The other companies make the same plea.

The best information as to the earnings of car companies, other than the Pullman Company, is that given in the report of the United States Commissioner of Corporations on the Beef Industry, House Document No. 283, Fifty-eighth Congress, third session.

The summary of the conclusions as to earnings (see page 281) was that the gross earnings per annum were from $200 to $240 per car, and that the net earnings per annum, with due allowance

for depreciation, varied from $75 to $150 per car. At the lowest rates this makes the net earnings about 37½ per cent of the gross; at the highest rates, 62 per cent. From this information it appears that the car companies engaged in the various lines of freight business earn about 45 per cent net per annum and should pay at the rate of about 7 per cent per annum on their gross earnings, if the tax on gross earnings is to equal 1 per cent on the value of the property.

* * * * * * *

OBJECTIONS RAISED BY THE PULLMAN COMPANY.

In long oral arguments presented by the attorneys for the Pullman Company before the commission, in lieu of the statement concerning earnings requested of the company, and in letters addressed to the commission, that company objected strongly to any tax measured by the gross earnings.

The objections raised were three in number. In the first place it was urged that the earnings of the company from interstate business could not be taxed. *When, however, it was pointed out that the tax was to be a tax on the property and franchises of the company in an amount to be measured by the gross earnings and that such a tax had been fully sanctioned by the United States Supreme Court, this line of argument was dropped.*

The second objection was that a tax on the gross earnings would exceed a tax on the *tangible property,* namely, the cars, used in the state.

This objection is stated in a recent letter to the chairman of the commission, as follows:

'I (Mr. Fernald, representing the Pullman Company) recall distinctly that in our conversation, you (Governor Pardee) insisted that it was the net results to the company which should govern the taxation of its property, rather than the value of the property (see note below by the commission) which it owned. * * * This position we can not concede, and must protest against its application to the taxation of this company's property. The fact that the company has valuable property elsewhere and is a prosperous company can not, and should not in fairness, be considered in fixing the value of its property for taxation.

This company has certain property which is used in California, to wit, sleeping cars, a greater part of which are used in interstate commerce and run beyond the limits of the State of California. Some few cars are used partly in interstate commerce, and partly in intrastate commerce, although not running regularly beyond the limits of the state, and the company is perfectly satisfied to pay taxes to the State of California on its property fairly therein on the same basis that other property in the state is taxed, and if the company is to pay such tax in a commuted form as by a percentage of gross earnings, it respectfully insists that the basis of such gross earnings should not be so fixed as to produce a tax in excess of what its tax would be upon a property valuation at the same rate of levy that other property in the state is taxed.'

NOTE.—If this read "value of tangible property" it would more nearly express the position taken by the commission.

In this contention the company overlooks the obvious fact that it owns and uses in this state much valuable property other than cars and that the 'net result to the company' is what determines 'the value of the property which it owned.' The value of the property of the Pullman Com-

pany, as a going concern, is determined by the same thing that fixes the value of an orange grove in bearing, namely, its net income. We may in this connection paraphrase the opinion of the United States Supreme Court in the *Ohio Express Company* cases, quoted in the preceding section, and say:

No more reason is perceived for limiting the valuation of the Pullman Company to its cars than that of railroad, telegraph, and express companies, to roadbed, rails, and ties; poles and wires; or horses, wagons, and furniture. The unit is a unit of use and management; and the cars; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in California, possess a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of this company as the others."

HISTORY OF THE LAW.

It would seem clear from the analysis of the two lines of cases bearing upon the question that our case comes within the principle of the *Minnesota* cases, being a tax on property the value of which as a unit is ascertained by resort to certain earnings as "an index or measure of the value." But so much has been said by counsel for appellant about the history of this law demonstrating that the value of appellant's property involved was not concerning the tax authorities so much as a wild desire to get at appellant's gross receipts, and upon the basis of their recital of the history of the law they argue so vigorously that the history proves their contention, we find it necessary to go into that history, *extensively and accurately.*

The history will show by the logic of facts, without argument on our part, that the tax is a tax on property computed at a percentage of the gross receipts and that it is not a tax on gross receipts camouflaged in any way.

"Ascertained by Reference Thereto, i. e., to a Just Equivalent of a Property Tax."

Before taking up the history of the law there is one point to which we may give some attention. This court has said:

> "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax

> upon property or a just equivalent, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution."

This statement, which seems very clearly to sustain our contention, occurred, we believe, for the first time in

Postal Tel. vs. *Adams*, 155 U. S., on p. 697,

but it has been frequently cited approvingly by the Supreme Court in other cases, sometimes without full reference.

In interpretation of this phrase counsel in the court below quoted several times from another passage in the *Postal Telegraph* case this statement:

> "If the ascertainment of the amount is made dependent in fact on the value of its property situated within the state,"

and, if we follow their thought correctly, would have us understand that what the court meant was that each time any tax *other* than a straight old-fashioned *ad valorem* property tax is levied, a complete and detailed property valuation must be made. We submit that so interpreted the sentence does not make sense. It amounts to saying that any tax to be valid must be a property tax equivalent to a property tax. Whereas the court was really saying that a certain so-called gross receipt tax was "not open to attack as inconsistent with the constitution."

The fact of the matter is that the California tax "is no more than the ordinary tax upon property" would be, and is "a just equivalent" therefor, and

was "ascertained by reference thereto" (that is, to the property), and "it is not open to attack as inconsistent with the constitution." It is not "an exaction" called "by whatever name," but is and is called a tax on the property. These are quite important features of our own contentions.

A. CHRONOLOGY, LEGISLATIVE AND ADMINISTRATIVE.

The present state tax system of California (including the particular tax before the court) had its official inception in 1903 when Governor George C. Pardee, in his inaugural address, called the attention of the legislature to the need for tax reform. Two years later, in 1905, he repeated, more forcibly, the admonitions made in his first biennial message.

Pursuant to the repeated suggestion, the legislature, by an act approved March 20, 1905 (*Stats.* 1905, Chap. 334), authorized the creation of a "commission upon the revision and reform of the system of revenue and taxation in force in this state."

The commission, notable for its membership, was composed of six persons. By law, the Governor was a member and chairman of the commission. Four other members were the members of a previously constituted joint committee of the senate and assembly "to investigate the system of revenue and taxation." These were: Hon. J. B. Curtin of Sonora, known as an authority on constitutional law; Hon. M. L. Ward, of San Diego, an attorney of recognized ability and

experience; Hon. E. F. Treadwell, one of the leading members of the San Francisco bar and author of a learned treatise on the constitution of California, and Hon. H. S. G. McCartney, an attorney of eminence of Los Angeles. The sixth member, appointed by the Governor by authority of the act referred to, as "expert in taxation and public finance," was Dr. Carl C. Plehn, Professor of Finance in the University of California, author of college textbooks on taxation, a widely recognized authority on taxation, and advisor to many states on tax reform matters. The commission adopted as its official name "The Commission on Revenue and Taxation." For brevity, we shall hereafter refer to it as the "commission of 1906," that being the year of its two reports.

The commission prepared and published two reports: a brief preliminary report in August, 1906, and a larger one in December, 1906. Both of these reports are important as they contain the authoritative statement of facts and of theory relied upon by the legislature in framing and by the people in adopting, the constitutional amendment upon which the new tax system—the present system—rests.

Following, but not literally, the recommendation of the commission of 1906, the legislature prepared and adopted by resolution, March 9, 1907, a constitutional amendment (*Stats.* 1907, p. 1353),

> "providing for the separation of state and local taxation, providing for the taxation of public service and other corporations for the benefit of the state"

and related matters. This amendment, in due course, came before the people for ratification in November, 1908.

This amendment of March 9, 1907, was rejected at the polls in November, 1908.

Meanwhile, the legislature, by the act of March 13, 1907 (*Stats.* 1907, Chap 203), made an appropriation

> "for the purpose of carrying on the work mentioned and provided for to be carried on under and by virtue of"

the act of March 20, 1905, above referred to. The commission of 1906 was thus continued in existence with the same membership (except that Governor J. N. Gillett succeeded, by virtue of his office, to Governor George C. Pardee).

The legislature of 1909 prepared another constitutional amendment very similar in purpose and intent to the one above referred to, but designed to meet and remove those objections raised during the campaign which the legislature believed had influenced the people to reject the first one. The new amendment was adopted by the legislature March 19, 1909, and was expected to be voted upon by the people in November, 1910. (See *Stats.* 1909, p. 1332.) This amendment, however, never reached the people, being withdrawn and another one substituted by the legislature in the second extraordinary session of 1910. (See *Stats. Extra Sess.* 1910, p. 16.)

At the regular session of 1909 the legislature passed an act, approved March 25, 1909 (*Stats.* 1909, chap. 446), providing for

> "the appointment of a commission to carry out the work mentioned and provided for in the act of March 20, 1905."

The act of 1905 referred to was the act first creating a commission on revenue and taxation. Under this act of 1909 the commission was reorganized and consisted of three members only, to wit, Governor J. N. Gillett, chairman, Hon. J. B. Curtin and Professor Carl C. Plehn, the last two having been members of the original commission. This commission published a report transmitted to the Governor under date of September 1, 1910, which report contains additional facts and figures supplementing and amplifying the reports of the previous commission and further explanation of the proposed tax system. It recommended changes in the original plan, and, together with the two preceding reports, this report served again to inform the people as to the merits of the general plan.

Before the day of the election at which the taxation amendment to the constitution was to be voted upon by the people, the Governor issued a "proclamation convening the legislature in extraordinary session" to meet and assemble on the third day of October, 1910. The reason for the special session (the second special session called in 1910) was the discovery of a clerical error in the transcription of

the taxation amendment, and was explained in the proclamation as follows, after legal reference to the resolution of proposal:

> "It appears that said amendment leaves uncertain the period for which the gross receipts and gross premiums mentioned in said resolution are to be computed upon which the taxes therein provided for are to be levied, and in case said amendment should be adopted in its present form by the people, such uncertainty would jeopardize the revenues to be raised by the state under such amendment." (*Stats. Extra Sess.* 1910, p. 11.)

The legislature so convened in extraordinary session revised the proposed amendment in the particular referred to in the proclamation by inserting the words "the year ending" in the fourth sentence, paragraph (*f*), before the words "the thirty-first day of December" in the definition of gross receipts.

The amendment was also amended in other particulars mentioned below. The text, as amended, is to be found in the

Statutes 1911, p. 14,

in the beginning of which volume is found the acts and resolutions of the second extra session of 1910. We quote that amendment in full, as follows:

> "Sec. 14. Taxes levied, assessed and collected as hereinafter provided upon railroads, including street railways, whether operated in one or more counties; sleeping car, dining car, drawing-room car and palace car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car

companies operating upon railroads in this state; companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons, partnerships, joint-stock associations, companies, and corporations.

(*a*) All railroad companies, including street railways, whether operated in one or more counties; all sleeping car, dining car, drawing-room car, and palace car companies, all refrigerator, oil, stock, fruit and other car-loaning and other car companies, operating upon the railroads in this state; all companies doing express business on any railroad, steamboat, vessel or stage line in this state; all telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies and each thereof within this state. When such companies

are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state.

The percentages above mentioned shall be as follows: On all railroad companies, including street railways, four per cent; on all sleeping car, dining car, drawing-room car, palace car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies, three per cent; on all companies doing express business on any railroad, steamboat, vessel or stage line, two per cent; on all telegraph and telephone companies, three and one-half per cent; on all companies engaged in the transmission or sale of gas or electricity, four per cent. Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided; *provided,* that nothing herein shall be construed to release any such company from the payment of any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by any of the municipal authorities of this state.

(*b*) Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half per cent upon the amount of the gross premiums received upon

its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state; *provided*, that there shall be deducted from said one and one-half per cent upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this state. This tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property of such companies, except county and municipal taxes on real estate, and except as otherwise in this section provided; *provided*, that when by the laws of any other state or country, any taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, are imposed on insurance companies of this state, doing business in such other state or country, or upon their agents therein, in excess of such taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, imposed upon insurance companies of such other state or country, so long as such laws continue in force, the same obligations and prohibitions of whatsoever kind may be imposed by the legislature upon insurance companies of such other state or country doing business in this state.

(*c*) The shares of capital stock of all banks, organized under the laws of this state, or of the United States or of any other state and located in this state, shall be assessed and taxed to the owners or holders thereof by the state board of equalization, in the manner to be prescribed by law, in the city or town where the bank is located

and not elsewhere. There shall be levied and assessed upon such shares of capital stock an annual tax, payable to the state, of one per centum upon the value thereof. The value of each share of stock in each bank, except such as are in liquidation, shall be taken to be the amount paid in thereon, together with its pro rata of the accumulated surplus and undivided profits. The value of each share of stock in each bank which is in liquidation shall be taken to be its pro rata of the actual assets of such bank. This tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon such shares of stock and upon the property of such banks, except county and municipal taxes on real estate and except as otherwise in this section provided. In determining the value of the capital stock of any bank there shall be deducted from the value, as defined above, the value as assessed for county taxes, of any real estate, other than mortgage interest therein, owned by such bank and taxed for county purposes. The banks shall be liable to the state for this tax and the same shall be paid to the state by them on behalf of the stockholders in the manner and at the time prescribed by law, and they shall have a lien upon the shares of stock and upon any dividends declared thereon to secure the amount so paid.

The moneyed capital, reserve, surplus, undivided profits and all other property belonging to unincorporated banks or bankers of this state, or held by any bank located in this state which has no shares of capital stock, or employed in this state by any branches, agencies, or other representatives of any banks doing business outside of

the State of California, shall be likewise assessed and taxed to such banks or bankers by the said board of equalization in the manner to be provided by law and taxed at the same rate that is levied upon the shares of capital stock of incorporated banks, as provided in the first paragraph of this subdivision. The value of said property shall be determined by taking the entire property invested in such business, together with all the reserve, surplus, and undivided profits, at their full cash value, and deducting therefrom the value as assessed for county taxes of any real estate, other than mortgage interests therein, owned by such bank and taxed for county purposes. Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property of the banks and bankers, mentioned in this paragraph, except county and municipal taxes on real estate and except as otherwise in this section provided. It is the intention of this paragraph that all moneyed capital and property of the banks and bankers mentioned in this paragraph shall be assessed and taxed at the same rate as an incorporated bank, provided for in the first paragraph of this subdivision. In determining the value of the moneyed capital and property of the banks and bankers mentioned in this subdivision, the said state board of equalization shall include and assess to such banks all property and everything of value owned or held by them, which go to make up the value of the capital stock of such banks and bankers, if the same were incorporated and had shares of capital stock.

The word 'banks' as used in this subdivision shall include banking associations, savings and

loan societies and trust companies, but shall not include building and loan associations.

(*d*) All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner to be provided by law, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the state.

(*e*) Out of the revenues from the taxes provided for in this section, together with all other state revenues, there shall be first set apart the moneys to be applied by the state to the support of the public school system and the state university. In the event that the above named revenues are at any time deemed insufficient to meet the annual expenditures of the state, including the above named expenditures for educational purposes, there may be levied, in the manner to be provided by law, a tax, for state purposes, on all the property in the state including the classes of property enumerated in this section, sufficient to meet the deficiency. All property enumerated in subdivisions *a*, *b*, and *d* of this section shall be subject to taxation, in the manner provided by law, to pay the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district, before the adoption of this section. The taxes so paid for principal and interest on such bonded indebtedness shall be deducted from the total amount paid in taxes for state purposes.

(*f*) All the provisions of this section shall be self-executing and the legislature shall pass all

laws necessary to carry this section into effect, and shall provide for a valuation and assessment of the property enumerated in this section, and shall prescribe the duties of the state board of equalization and any other officers in connection with the administration thereof. The rates of taxation fixed in this section shall remain in force until changed by the legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof. The taxes herein provided for shall become a lien on the first Monday in March of each year after the adoption of this section and shall become due and payable on the first Monday in July thereafter. The gross receipts and gross premiums herein mentioned shall be computed for the year ending the thirty-first day of December prior to the levy of such taxes and the value of any property mentioned herein shall be fixed as of the first Monday in March. Nothing herein contained shall affect any tax levied or assessed prior to the adoption of this section; and all laws in relation to such taxes in force at the time of the adoption of this section shall remain in force until changed by the legislature. Until the year 1918 the state shall reimburse any and all counties which sustain loss of revenue by the withdrawal of railroad property from county taxation for the net loss in county revenue occasioned by the withdrawal of railroad property from county taxation. The legislature shall provide for reimbursement from the general funds of any county to districts therein where loss is occasioned in such districts by the withdrawal from local taxation of property taxed for state purposes only.

(*g*) No injunction shall ever issue in any suit, action or proceeding in any court against this state or against any officer thereof to prevent or enjoin the collection of any tax levied under the provisions of this section; but after payment action may be maintained to recover any tax illegally collected in such manner and at such time as may now or hereafter be provided by law."

The amendment adopted at the second extra session of the legislature (October 5, 1910) was submitted to the people on the eighth day of November, 1910, and was ratified.

The legislature of 1911 thereupon addressed itself to the formulation of a statute to carry the new tax system into effect. The act resulting, which was approved April 1, 1911, became chapter 335 of the Statutes of 1911. This act was amended in 1913 (*Stats.* 1913, Chaps. 6 and 320). It was again amended in 1915 (*Stats.* 1915, Chap. 2). In 1917 the legislature undertook a partial codification of the revenue laws and the substance of the statute of 1911, as amended in 1913 and in 1915, together with some new amendments, was incorporated in the Political Code as sections 3664 to 3671, inclusive, although the old sections are still in full force and effect for certain taxation purposes, as will be explained below.

B. THE DEFINITION OF THE TAX: HISTORICALLY.

The first official definition of the tax to go into force is found in the amendment proposed by the

commission of 1906. Eliminating matter not relevant, and italicizing the pertinent words, it reads:

> "All railroad companies * * * *all sleeping car* * * * companies, operating upon the railroads of this state, * * * shall annually pay to the state a tax upon *their franchises*, roadways, roadbeds, rails, *rolling stock*, poles, wires, pipes, canals, conduits, rights of way, and *other property used in the operation of their business in this state computed as follows*: Said tax shall be equal to the percentage hereinafter fixed upon the gross receipts from operations of such companies and each thereof within this state. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state. Such taxes shall be *in lieu of all other* taxes and licenses, state, county, and municipal, *upon the property* above enumerated of such *companies*."

The same language without change is found in the amendment submitted to the people by the legislature of 1907 and voted on in November, 1908.

In the amendment adopted by the legislature of 1909, the language was the same but with one important exception, and that is that the definition of

operative property was made more specific, being made to read, after the enumerated items,

> "and other property or any part thereof used *exclusively* in the operation of their business in this state."

The change shown by the italicized word covered cases of divided use where a building, for example, is used in part as a railroad station and in part rented for offices, stores and other uses. It affected the division of the Pullman Company's property near Richmond.

The amendment prepared at the extraordinary session and approved by the people November 8, 1910, follows, in this particular, the language as amended in 1909.

The subsidiary definition of gross receipts now found in paragraph (*f*), section 13, article XIV, of the constitution, for the correction of a clerical error in which the extraordinary session of the legislature was called, was not in the draft prepared by the commission of 1906. In the amendment adopted by the legislature of 1907 it read:

> "The gross earnings and gross premiums herein mentioned shall be computed for the year ending the thirty-first of December prior to the levy of such taxes and the value of any property mentioned herein shall be fixed as of the date of said levy."

The reference is to the operative property.

The last part of the same sentence in the amendment as adopted and now part of the constitution reads:

> "and the value of any property mentioned herein shall be fixed as of the first Monday in March."

The first Monday in March is the date as of which the assessment of property taxable locally is made, and the provision as it now stands makes the state and local systems conform as to dates. This is again evidence that we are dealing with a tax on property.

The constitution's definition of the property taxed for state purposes was carried verbatim into the act of 1911 and is still found unchanged in section 3664*a* of the Political Code.

The same is true of the constitutional definition of gross receipts which is carried into section 3665*a* of the Political Code. The amplification of the definition of "gross receipts" to be found in the section above referred to is not questioned in this case. But it is important to note that in section 3665*a*, subdivision 4, it is made certain *that income from property other* than the property taxed by reference to gross receipts is not to be included in the gross receipts. This again shows the exact correlation of the tax to the property and the strict *in lieu* character of the tax.

In section 3665*b* of the Political Code the definition of "operative property," to wit, that taxed for state purposes, is expanded and clarified by an enumeration of items. In other sections—notably in section

3666—where possible conflicts of jurisdiction between the state board and the local assessors are guarded against and provided for, in the provisions for the state tax roll, the local "operative roll," the seizure and sale of property for delinquent taxes, and elsewhere, it is made clear beyond question that the tax is conceived and administered as a tax on property.

Finally, the provisions of paragraph (*e*) that, in case of a deficiency tax it shall fall on

> "all property in the state, including the classes of property enumerated in this section,"

adds its clear testimony as to the intent to tax property.

That the entire scheme or system of taxation involved in the provision of the constitution was concerned solely with property, its taxation for state purposes solely by the new method and the resultant effect upon local revenues by the withdrawal of such property from the local taxing jurisdiction, is further proven by the acts of the legislature passed in 1911 for the reimbursement of these local tax districts because of their loss of such taxable property so withdrawn. The effect on each county is carefully considered by the commission in its report of 1910, page 18, *et seq.*, and as a result the legislature, after the constitution had, by its adoption, withdrawn such properties from local taxation, passed statutes of reimbursement both for property loss and bond purposes. (See Appendix, p. 134.)

C. THE RATES—THE HISTORY OF THEIR DETERMINATION.

The tax rates suggested originally by the commission of 1906, those adopted by the legislature in the amendment and approved by the people, and those levied and fixed by the legislature by statute, all have a very definite bearing on the matter in hand. That is because (as we shall show conclusively elsewhere), these rates were *consciously and publicly and after full hearing fixed and adjusted with express reference to the value of the property taxed.* The changes in rates made from time to time were made in order to fit the rates to the changes in the values of the taxed properties. The tax on car companies is but one in a series, or in a system, which to be fully understood must be considered as a whole. Therefore, it will be convenient for the court to have before it the entire list.

The changes made each time resulted from an endeavor to fit the taxes more and ever more closely to property values.

The commission of 1906 placed its data before the legislature with only general recommendations as to rates, leaving it to the legislature to determine finally what should be the rates placed in the amendment for submission to the people. Its suggestion for the five public utilities will be found in a footnote on page 19 of the report of 1906 and were:

> For railroads "not less than 4 per cent nor more than 5 per cent."

For car companies "not less than 4 per cent nor more than 5 per cent."

For express companies "3 per cent."

For telephone and telegraph companies "3½ per cent."

For gas and electric companies "not less than 4 per cent nor more than 5 per cent."

In the case of insurance companies 1½ per cent on premiums, of banks 1 per cent on book value of capital stock and franchises 1 per cent on assessed value were the recommendations of the commission.

The legislature in preparing the first amendment (the one defeated in 1908), made these rates as follows:

	Per cent
Railroads	4
Car companies	3
Express companies	2
Telephone and telegraph companies	3½
Gas and electric companies	4
Insurance companies	1½
Banks	1
Franchises	1

The amendment prepared in 1909 followed the same rates except that the rate for banks was reduced to 6/10 of 1 per cent. But that change was eliminated and the bank rate was restored to 1 per cent at the special session of 1910.

So the rates submitted to the people and found in the amendment as first adopted were the same as those immediately above.

These were also the rates carried into the statute of 1911.

In 1913 the legislature, after hearing and investigation, acting in accord with the constitutional direction, amended the rates as follows:

	Per cent
Railroads	4¾
Car companies	4
Express companies	2
Telephone and telegraph companies	4.2
Gas and electric companies	4.6
Insurance companies	1¾
Banks	1
Franchises	1

In 1915 these rates became:

	Per cent
Railroads	5¼
Car companies	3.95
Express companies	1.6
Telephone and telegraph companies	4½
Gas and electric companies	5¼
Insurance companies	2
Banks	1.2
Franchises	1.2

In 1917 the rates became:

	Per cent
Railroads	5¼
Car companies	3.95
Express companies	.9
Telephone and telegraph companies	4.2
Gas and electric companies	5.6
Insurance companies	2
Banks	1.16
Franchises	1.2

The more important changes were:

Railroads from 4 per cent up to 5¼ per cent in 1915 and 1917.

Car companies from 3 per cent up to 4 per cent in 1913 and then reduced to 3.95 per cent (1915, 1917).

Express companies from 2 per cent down to 1.6 per cent in 1915 and 9/10 of 1 per cent in 1917, reflecting the decline in those properties and values with the coming of the parcels post and other unfavorable circumstances.

Telephone and telegraph companies from 3½ per cent up to 4.2 per cent in 1913 and to 4½ per cent in 1915, then back to 4.2 per cent in 1917.

Gas companies steadily upward from 4 per cent to 5.6 per cent.

The other changes are not important in this case except as they reflect the changes in the burden of local taxation.

Since the matter of rates is very vital to the case before the court, a brief history of how they have been determined, beginning with the tentative recommendations of the commission of 1906, will be helpful.

The commisison of 1906 had proposed that the rates first fixed should remain in force six years and that thereafter they be fixed from time to time by the legislature.

But the first amendment which went to the people in 1908 provided within itself no means of changing the rates of the taxes. Hence, had that amendment been adopted, they could be changed only by a constitutional amendment. This was one of the objec-

tions which in the opinion of the Commission on Revenue and Taxation of 1910 (see page 13 of its report) moved the people to reject the amendment in 1908. The amendment of 1909 provided:

> "The rates of taxation fixed in this section shall remain in force until changed by the legislature, three-fourths of all members elected by each of the houses voting in favor thereof."

This provision was changed in the last amendment, at the extra session of 1910, by substituting *two-thirds* for *three-fourths*, and in that form it is now a part of the constitution.

When the legislature changes the rates it recites in the statute its method of procedure. We may refer, as an example, to the act of January 25, 1915 (*Stats.* 1915, Chap. 2; there are similar statutes in 1913 and 1917), where we find the following declaration:

> "Sec. 35. In so far as the rates of taxation upon the property and franchises described and enumerated in section fourteen of article thirteen of the constitution of the State of California and in section one of said act approved April 1, 1911, as amended February 3, 1913, differ from the rates of taxation upon such property and franchises as fixed and defined by this act, it is hereby declared to be the intent and purpose of the legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof, by virtue of the authority conferred upon the legislature by subdivision (*f*) of section fourteen of article thir-

teen of the constitution to change the rates of taxation heretofore fixed and imposed by said section of the constitution and enumerated and specified in said act approved April 1, 1911, as amended February 3, 1913, to the rates fixed, determined, established and set forth by and in this act.

This tax levy, and each and every of the percentages or rates of taxation herein and hereby determined, made, fixed and established to be paid by the persons, firms, companies and corporations specified, described or included in section fourteen of article thirteen of the constitution, are and have been determined, made, fixed and established after a full, complete, open and public investigation and hearing by and before this legislature upon and respecting the value of each and all of the properties and franchises included within or enumerated in section fourteen of article thirteen of the constitution, and of all other and different property subject to taxation of any kind within the State of California, of which investigation and hearing every and all persons, firms, companies and corporations concerned therein or affected thereby had due notice; and at which investigation and hearing the legislature took oral and written evidence and at which hearing every and all persons, firms, companies and corporations concerned therein or affected thereby and who desired so to do, were given an opportunity to and did appear and were heard and introduced evidence before this legislature respecting and showing the value of said properties and franchises included within or enumerated in said section fourteen of article thirteen of the

constitution and also respecting and showing the value of all other and different property subject to taxation of any kind within the State of California, and after the due consideration of all of said evidence by this legislature and its ascertainment and determination therefrom and thereon of the value of said and all of said hereinbefore mentioned properties and franchises; and the percentages or rates of taxation herein and hereby determined, fixed and established have been and are determined, fixed, and established, and have been and are based, upon the value of each, all and every of the properties and franchises included within or enumerated in said section fourteen of article thirteen of the constitution as ascertained and determined as aforesaid by this legislature and constitute and are the percentages or rates of taxation ascertained and determined by this legislature which when applied in the manner provided and required by law, do and will levy a tax upon said properties and franchises included within or enumerated in said section fourteen of article thirteen of the constitution in proportion to the value of the same and in proportion to the value of every and all other and different property subject to taxation of any kind within the State of California as ascertained and determined as aforesaid by this legislature."

This legislative declaration contains four points: (1) That the rates were fixed after full investigation and hearing as to the *value of the properties and franchises* of the companies taxed, and of all other

properties taxed; (2) that all concerned had a hearing; (3) that the rates are based upon the value of the properties and franchises; and (4) that the rates determined *do and will levy a tax upon the properties* and franchises of the companies "in proportion to the value" of the same and in proportion to the value of every other kind of property taxed.

We are not here concerned with the theory that the state taxes should be equated with the local taxes, beyond the point that the endeavor to so equate is evidence of a commendable spirit of justice and fairness on the part of the legislature. The point is that the legislature says that it levies the tax only on the properties and franchises.

We are not desirous of obscuring the fact that the legislature was distinctly interested in and desirous of seeing to it that the companies taxed for state purposes should not escape their fair share of the taxes. No doubt the legislature wished to make the companies pay all that they could justly be asked to pay. But it is fully clear from the record that the legislature did not attempt to make the companies pay more than their fair share, and we must ask on behalf of the legislature full credit and credence on this point.

The real truth of the matter is that the constitution requires the legislature to tax the property, and the legislature does so. Moreover, the legislature fully considers the *value of the property*. To make

this clear we continue our review of the work of the commission and other advisors of the legislature, from 1905 on.

D. THE WORK OF THE COMMISSION OF 1906 AND SUBSEQUENT BOARDS.

The commission of 1906 began its work with an extensive investigation of the then existing system of taxation. It found a great many inequalities and weaknesses. These it listed on pages 9 and 10 of its final report. We have reprinted them for convenience of the court in the Appendix to this brief. They should be considered, and considered together, not separately, because they proved cumulatively the necessity for a radical tax reform. Among them is item 15.

> "Under the present system it is impossible to adjust the burden of taxation equitably between *different classes of corporations.*"

Among the evils it was found that the railroads and certain other public utilities, and very conspicuous among them the Pullman Company itself (see particularly pages 196 and 201 of report quoted at length in the Appendix to this brief), *were not bearing their fair share* of taxation. The findings were based on the most painstaking assembling of facts and figures and a thorough, scientific analysis thereof. The report bristles with figures, tables and mathematical formulæ, charts and diagrams.

One of the most noteworthy examples is the chapter beginning on page 91 and quoted in full in the Appendix, which explains in simple language the scientific basis of the proposed new taxes on public utilities and which we shall examine at length below.

The commission was not content with investigations made solely on its own initiative. It held hearings, with reference to which the report states:

> "Every corporate interest affected was offered a full and complete hearing, and this offer was accepted very fully. Representatives of associated interests such as the street car companies association, the association of light, heat and power companies, the bankers association and many representatives of individual corporations have either appeared before the commission at its regular sessions, or have gone over the matters involved with the chairman, the secretary, or with individual members of the commission and given all requisite information. The sole exception is the Pullman Company, which declared itself unable to present any data, but presented many arguments. These hearings in general have resulted in a clearer understanding as to the probable effect of the commission's proposed changes.
>
> In general, the discussions at these hearings had relation to the rates proposed. In only one instance, namely, by the Pullman Company, had the method of taxation proposed or the general plan of the commission been attacked in principle."
>
> *Report of commission* of 1906, p. 6.

We do not wish to dwell invidiously upon the recalcitrance of the Pullman Company in refusing that assistance and cooperation which, according to the report, was rendered by every other one of the interests affected. But we do wish to point out that the commission, while clearly expressing its justifiable dissatisfaction with the attitude of the company's representatives, did not allow any possible irritation to affect its judgment (see p. 199, quoted above). It used the best information it could obtain and treated that company fairly as it did all the others.

Under the then existing system the cars and franchises of car companies were assessed on an ad valorem basis by the State Board of Equalization, and such ascertained assessment was then distributed to the local taxing counties and districts through which the car company operated, and any other property, such as shops, was assessed by the local assessors where located. The commission found such a method antiquated and ineffective. The principles involved and the facts and figures are discussed at greater length in chapter IV, taxation of railroads (report 1906) beginning at page 103, which covers 79 pages, and the application to car companies is made in section 3 of chapter V, beginning on page 196. (This section is reprinted in the Appendix to this brief.) We find also in the reports of the State Board of Equalization for the same

period information fully confirmatory of the commission's finding of inadequacy of taxation of car companies. Thus, in 1907, that board, having taken a hint from the suggestion of the commission, used gross receipts as one of the factors in arriving at the value of the property which it was required by law to assess. They thus discovered, with apparent surprise, that the Pullman Company had never been assessed for a franchise. We quote from the report of the State Board of Equalization of 1907–1908, an official document, page 11:

> "As to the Pullman Company, this board has endeavored for years to obtain a report from the company which would give the California earnings thereof, or at least a fair estimate of such earnings, but the company claims that it can not give such information and has always refused and neglected to even approximate such earnings for the board. As we had adopted the gross earning plan for our assessment of the railroads, we were compelled, therefore, to make an estimate of the earnings on our initiative. We also examined the records of the assessments heretofore made of this company and found that in no instance had a franchise value ever been assessed and it was patent to us that the company was exercising and owned valuable franchise rights to do business in this state. Therefore, for both years covered by this report said company was assessed with a franchise value."

As a first step to reform the commission recommended "the separation of state from local taxation

as to sources of revenue." What was meant by this is very fully explained in the report of 1906. (See particularly page 77, following, reprinted in the Appendix to this brief.) The plan involved selecting certain classes of property for state taxation leaving all other properties to be taxed as they were before, locally. The classes of property segregated for state taxation are fully described in the constitution (article XIII, section 14).

When adopted, the plan set up two distinct dominions or jurisdictions in taxation—one, that of the state, the other that of the counties, municipalities and districts, or, in general, the dominion and jurisdiction of local government taxation. Thus, the commission said:

> "To accomplish separation it is necessary to define clearly and sharply the boundary line between state and local powers of taxation. This boundary line having been once defined, neither of the two parties shall trespass upon the territory set apart for the other." (*Report of Commission* of 1906, p. 78.)

Having thus set up two different dominions or jurisdictions in taxation the commission then sought to establish those methods of taxation in each which it thought would be most effective to secure just and equitable taxation. In the dominion of state taxation it recommended that the public utilities whose properties were to be taxed under that jurisdiction

should pay a tax on their operative properties, computed in proportion to the gross receipts, each class of companies at a different rate. The rate in each case was to be such as to impose the *same burden of taxation in proportion to property used.*

One of the objects was to devise a method as largely mathematical and as little discretionary as possible.

> "To determine the *value* of a piece of property requires judgment, and opinions thereon may differ." (Italics are in original report of 1906, page 164.)
>
> "We knew by bitter experience that *the* tax on property (i. e., the old tax) fails, especially where large corporate interests are affected." (Page 91; italics are ours.)
>
> "But the gross earnings of a railroad constitute a definite fact. Their sum does not vary with differences of opinion."

It therefore decided to use the gross receipts as the basis of computation.

In its preliminary report, published in August, 1906, the commission said:

> "Taxation, according to gross earnings, is simple and easy of administration. It is almost automatic in its operation, being the application of a mathematical rule, and not calling for the exercise of wide discretionary powers on the part of any officials." (*Preliminary report of commission* of 1906, p. 49.)

The next step was to solve the problem of making a tax computed on the basis of gross earnings the

equivalent of a tax on the property. Counsel for plaintiff contended in the court below that the phraseology used in the constitution is a mere subterfuge. If they are right, it is strange, indeed, that the legislature should be persuaded year after year to perpetuate and spend more money for the expensive process of *investigating values of property*; and that the commission of 1906, that of 1910, and subsequently the Board of Equalization, the State Board of Control, and still more recently the State Tax Commission of 1915–17, as well as successive governors and state controllers, in all a very considerable body of persons, should without protest on the part of any one of them have entered into the performance of what, according to appellant's contention, is a shallow and transparent deceit.

The intent of the new tax law as recorded in the report of the commission of 1906 and, for that matter, as clearly shown in the subsequent proceedings of the legislature in 1913, 1915 and 1917 was to comply (see section 35, chapter 2, *Statutes* 1915, above cited) honestly, fairly and openly with the letter and with the spirit of the decision of the United States Supreme Court in

> *Wisconsin and Michigan Ry. Co.* vs. *Powers*, 191 U. S. 379,

then the last word on the subject, and to propose a tax on

> *"the property and business of such railroad corporations operated within the state computed upon certain percentages of gross income."*

This was done, not merely out of deference to the Supreme Court of the United States, although that might have been considered a fully sufficient motive, but for another reason as well. The other reason was one which no doubt would have equally moved the court, for it is so obviously fair and equitable. That reason the commission stated at length in many different parts of its report. We quote from one place only:

> "In all of those states in which, in recent years, a change has been made in the taxation of public service corporations, either from the ad valorem system to a gross earnings tax, or from a gross earnings tax back to an ad valorem system, or in which any substantial change or reform has been suggested in regard to the taxation of public service corporations, the question has always been raised whether the proposed rates or methods of taxations for such companies would result in 'equal taxation.' It is difficult to determine exactly what is meant, in this connection, by 'equal taxation,' but in the popular mind, as expressed during the discussion of such proposed reforms, there has been an idea that, by whatever method a railroad, for example, may be taxed, the burden of taxation thereon should be, and must be, as heavy as that which is borne by a farmer or by an owner of real estate and personal property on the regular assessment rolls. The idea seems to be that if the tax is levied upon the gross earnings, it must result in the imposition upon a railroad or other public service corporation of a burden fairly equal to that which it would bear if fully

assessed on an ad valorem basis as any other property might be.

In view of the strength of the *popular feeling that taxes should be 'equal,' and of the obvious and essential justice of a demand,* it is highly important to discover a practical method for determining whether the burden of a tax which it is proposed to impose upon the gross earnings of a given class of corporations is the equivalent or not of a tax which might be levied under an ad valorem plan. Such a method has been devised by this commission. By the application of this method we can ascertain what rate of tax on the gross earnings is the equivalent of a given tax rate on the property, and vice versa. This will make it possible to compare any proposed gross earnings tax with an assumed 'fair' rate on property." (*Report of commission* of 1906, p. 93, Appendix, p. 149 of this brief.)

VALUATION NUMBER ONE.

The method by which the commission proposed to correlate and equate a tax computed on the gross receipts to a tax on the property used to produce these gross receipts, is set for that length and with scientific precision in the report of 1906. (See particularly p. 93, following, Appendix, p. 149 of this brief. The theoretical basis of the method is that *net earnings determine the value of the property.* This is an elementary proposition at the foundation of all property values. It has been stated over and over again by the courts. Thus, in

Adams Express Co. vs. *Ohio,* 165 U. S. 194.

the court decided the case almost wholly on this basis. In the

Indiana Railroad Tax cases, 154 U. S. 439–445, the court said:

> "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value, it is taxed upon something which is created by the uses to which it is put."

In

Postal Telegraph Cable Co. vs. *Adams,* 155 U. S. 688–695–697,

the court said:

> "but the value of property results from the use to which it is put and varies with the profitableness of that use, * * *"

The same concept is a commonplace one among economists.

Thus, Professor Irving Fisher of Yale, in his book on the "Nature of Capital and Income," shows the *value* of capital (property) depends on the amount of income its ownership assures. In chapter XIII, section 1, page 202, he says:

> "That value (the capital value) is simply the present worth of the future income from the specified capital."

Again, on page 223, he says:

> "We concluded therefore, that the *value* of any capital-good, either of wealth or of property-rights, assuming that all future income is foreknown, is the discounted value of that income."

In his conclusion occurs this statement:

> "When *values* are considered, the causal relation is not from capital to income, but from income to capital; not from present to future, but from future to present; in other words, the *value* of capital is the discounted value of the *expected income.*"

Professor Frank A. Fetter of Princeton, in Volume I of his *Principles of Economics,* says:

> "The issue of capital stock is the putting of the *incomes* of wealth into marketable form. Stock companies, or corporations, are business enterprises which issue stock, or certificates of a share in their wealth and income. * * * But as a business proves *more or less profitable* the value of a share of its stock rises and falls regardless of the original amount of stock issued. At once there is a divergence between the nominal or face value and the market value of the stock * * *. When stock is the only form of claim on the earnings that is issued, the fluctuations of the market value of the stock record the real value of the business; that is, the capital value of the rents (income) that it is expected to yield." (pp. 127–8.)

The method proposed by the tax commission is as follows (page 94, *report* of 1906):

> "Briefly stated that method is: To determine what tax rate on gross earnings is the equivalent of a given rate on the property, for a given class of public service corporations. (1) Ascertain what percentage of the gross earnings is net; (2) ascertain what rate of interest would constitute a fair return to investors in the securities of the class of public service corporations under consideration; then (3) divide the percentage of net earnings by the rate of interest and multiply the result by the given tax rate on property. Expressed algebraically, let t equal the rate sought, n equal the percentage of net earnings to gross, i equal the interest rate on the investment, and r equal the given tax rate on property; then,
>
> $$t = \frac{n}{i} \times R$$ "

This necessitated classification which the commission (page 94) explained as follows:

> "The first step in the application of this method by the commission was the determination of the class to which a corporation belongs by virtue of the percentage which its net earnings bears to its total gross earnings. An examination of the accounts of different classes of public service corporations showed that they fall into very distinct classes according to the percentage which their net earnings bear to their gross earnings. This does not mean that every company belonging to a given class has the same percentage of net earnings to gross. But merely that each of the great

classes of public service corporations presents a type to which the individual companies tend to conform, and from which they differ only while young or while from some other reason incomplete or imperfect.

Thus, for example, we found that railroad companies, operating steam railroads, normally pay about 64 per cent of their gross earnings for operating expenses, leaving 36 per cent to pay interest upon bonded indebtedness, dividends upon capital and similar items. That is, out of every $100 received, $64 goes to pay for wages, fuel, maintenance of way and equipment, and other items of cost involved in operation, and $36 is left for payment of interest on bonds, dividends on stock, and similar items. It is this $36 which gives value to the property. For fifteen years this average rate had not varied in the United States as a whole more than two points."

In short, the commission assumes, what is apparent to everyone, that there are classes of corporations according to the percentage of net to gross earnings. Some companies whose gross earnings are largely due to the work of men and women employed and to organization, like the express companies, and which have relatively little property to support, spend nearly all their gross earnings in wages and other operating costs, and the relatively small percentage left over is quite sufficient to support the relatively small amount of property used. Then there are others, like the great electric power companies, which have large and costly plants to support, which plants,

however, are nearly automatic in operation and consequently require relatively little labor, so that total operating expenses are a relatively small part of the gross. The large net earnings give value to and maintain the large capital investment used. This helps to explain the differences in rates applied to gross receipts.

The tenor of appellant's contention is that the value of the property used by a corporation is one thing, the gross receipts another thing, and that there is no connection between them. The logic and practice of the business world is, and for so many years has been, against this contention, that it seems strange to find it again advanced. Out of the gross earnings come net earnings, and by them is the value of the property caused. For example, when the Western Pacific Railroad had small gross earnings and little or no net its securities shrank in value, and possession or ownership of them became a dangerous liability which no one cared to assume. The road failed and went into the hands of a receiver. It still had taxable property and some gross receipts, but its net receipts were small and the value of the property small. When its earnings were partially restored, by the skill of the receiver, a time came when a purchaser could be found, and today the property has a higher value. The value of the property of a public utility, save as old junk, is wholly dependent upon its value as a going concern, the best evidence of which is that it has gross receipts.

Every day we find the public utilities before the State Railroad Commission arguing that a public service corporation is worth what it can earn at the schedule of rates it is permitted to charge; and that the earnings as a whole and in the long run determine the property value of such corporations.

This is the basis of the classification found in the constitution and of the difference in the rates applied to the gross receipts of different classes of companies.

Although the Pullman Company refused to furnish any data on its earnings, the commission obtained from the newspapers a report of the income of that company which showed (see page 199, *report* of 1906, for details; Appendix, p. 181, of this brief) that "the net earnings were 36 per cent of the gross earnings, the same as for steam railroads." On that basis it recommended a rate of 4 per cent. According to the formula, this involves capitalization at 9 per cent.

Thus, in $t = \frac{n}{i} \times R$, $n = .36$ $i = .09$ $R = 1$,

Hence, $t = \frac{.36}{.09} \times 1 = .04$

This valuation was advisory only. The legislature did not adopt it and no tax based upon it was actually levied.

VALUATION NUMBER TWO.

The legislature, however, within its discretionary powers and in its judgment, fixed and determined the

Pullman Company rate at 3 per cent. It may have been moved thereto by a consideration of the risk of the business and have used 12 per cent as a basis of capitalization in the formula; or it may have taken into consideration the peculiar relationship between the Pullman Company and the railroads over which it operates; or it may (and as we shall see below, probably did) have had better or later information than the commission had. Since there is no allegation of fraud or malice as to this assessment, the reasons and facts which moved the legislature in the determination of the rate are not under review, and need not now be ascertained. The rate rested at 3 per cent until 1913.

This was a legislative valuation. It resulted in a tax levied and collected. Upon the power of the legislature in matters of taxation, its discretion as to the manner of ascertaining the tax, the kinds of property that may be taxed and the different rates that may be imposed, we may quote from

Cooley's Law of Taxation (3d ed.), 255:

> "The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation. All this is legislative, and the legislative conclusion in the premises must be accepted as proper and final. It follows that a tax can not be attacked on averment and proof that some other tax for the same purpose would have been more just and more equal. An excise tax on one kind of business only

is not illegal for the discrimination; it is always to be conclusively presumed that the legislature found good and controlling reasons impelling the action it has taken, and that, in view of all the circumstances which were known to its members, the tax which has been provided for is reasonable."

VALUATION NUMBER THREE.

In 1912 the State Board of Equalization made and transmitted to the Governor, who, in turn, presented it to the legislature, a new investigation and report on the state taxes and on the entire system of state and local taxation. This report is called "special report of the California State Board of Equalization relative to burden of state and local taxes in 1912." This is a public document and published official report.

The new tax system had been in force some two years and many were concerned to know how it operated. An experiment had become a *fait accomplet*. The investigations were elaborate, and no expense was spared to make them accurate and impartial. They addressed themselves primarily to the question as to whether the taxes paid by the corporations taxed for state purposes were the fair equivalent of the taxes paid by real estate taxed locally. This, in our opinion, is a question of policy. There is no legal necessity, as we have heretofore pointed out, that the taxes levied by the state within

its domain and jurisdiction upon the properties which it is authorized to tax solely for state purposes should be the equivalent of the taxes levied locally for local purposes. There is no such legal necessity any more than there is a legal necessity that the taxes levied in San Francisco, to be valid, must be equal to the taxes levied in Los Angeles. In fact, the question has not been raised, and we refer to it as a matter of policy within the discretion of the board and of the legislature, merely because and to show that the state government has been moved by and acted in the spirit of fairness and at all times was considering property values and taxation. It is cumulative evidence that the legislature intended to be just as between all properties and to avoid discrimination when imposing taxes on such properties. For, stripped of all technicalities and stated in bald terms, the real question before the court is "do the taxes imposed on the Pullman Company discriminate unfairly against the company and thus by discrimination burden interstate commerce?" Absolutely "No!" is the only answer.

Discussion of Valuation.

Logicians and scientists make a distinction between deduction and induction as methods of arriving at conclusions. The method of the commission of 1906 in valuing the property and arriving at the rates was *deductive*. It proceeded from the general to the

particular. The syllogism was, in the case of the Pullman Company:

(*a*) Major premise. The net earnings determine the value of the property, when capitalized at a fair rate.

(*b*) Minor premise. The net earnings being 36 per cent of the gross, 9 per cent being a fair rate of capitalization, and it being designed to impose a tax of 1 per cent on the property.

(*c*) Conclusion: Then a rate of 4 per cent on the gross earnings is indicated as the equivalent of 1 per cent on the property.

The State Board of Equalization in 1912 proceeded to test the conclusion and verify the premises *inductively*. That is, it proceeded from the particular to the general, and then back to the particular. This is a common method of verification of a deductively arrived at conclusion. It is sometimes expressed as "seeing whether the facts agree with the theory."

The board sought to ascertain directly: (1) What is the value of the property of the utilities; (2) what is the average of the local rates on property; (3) what are the gross receipts of the utilities (see *special report* of 1912); and from these facts to ascertain by simple division what rate on gross receipts will give a rate on property equal to the average local tax rate. It is startling, indeed, to note how closely the facts thus independently and impartially ascertained sustained the theoretical method of the commission.

The differences in the results obtained and shown by the two reports are such only as are fully explained by the changes in conditions during a period of six years. A similar striking confirmation of the accuracy of the method of the commission of 1906 is reported by the State Tax Commission of Minnesota in 1912 (see page 240, report of that commission for that year, a published official report). After studying some nine different valuations of the railroads of that state, many of which had been made at great expense, that commission tried the "Plehn formula" (or that of the California commission of 1906), and found that this simple, direct and inexpensive method gave substantially the same results as the best of the other methods.

The State Board of Equalization of California, after consideration (see page 22, *special report* of 1912) of the various methods of valuation available, decided, for reasons given fully in the report, that the so-called *stock and bond method* was the best for its purposes. One advantage of this method is that it ascertains directly what rate of capitalization the investors in the investment market actually do apply to the net earnings of different companies in arriving at the capital value. Thus, one element of assumption and opinion in the deductive method is reduced to concrete fact.

In the interval between 1905 and 1912 the average burden of taxation in California for property in general taxed locally had risen, as the investigation

showed, from 1 per cent to 1.1386 per cent, or about 1.14 per cent. (See page 13, *special report* of 1912.)

Upon the Pullman Company in particular the report said (p. 17):

> "As to the Pullman Company it should be said that the commission had insufficient data. The Pullman Company did not furnish the commission of 1906 with data for a computation and that commission made its own estimate of the earnings. That defect can now be supplied.
>
> The Pullman Company reported to the board that in 1911 its gross receipts from the entire system were $76,257,749.76, of which $11,101,201.15 were net, or a ratio of 14.55 per cent. The Pullman Company's stock is selling on a 5 per cent investment basis. Hence, by the commission's method, a rate of 3 per cent for the tax on gross receipts would be the equivalent of 1 per cent on the property used, as against 4 per cent to 5 per cent recommended by the commission. It appears that the judgment of the legislature was more accurate than that of the commission."

The board then proceeded to ascertain the value of the property of the Pullman Company used in California and found it to be $6,804,932, and the taxes levied thereon to be $59,971.06, or .8813 per cent (see p. 18).

With these facts before it, and exercising its own judgment as to the values of the operative properties to be taxed, the new legislature raised the rate on gross receipts of car companies to 4 per cent and at

the same time made other adjustments in the schedule of rates which it solemnly declared by statute to be taxes on the property and franchises fixed and determined by reference to the value of the property. (*Stats.* 1913, p. 8.) That the statement made in the statute is true is sufficiently evidenced by the report referred to, even if one were to question, as does the appellant, the truth of the legislature's word.

VALUATION NUMBER FOUR.

In 1914, the State Board of Equalization, assisted by the State Board of Control, again made an investigation and report which is reprinted in the report of the State Board of Equalization of 1915–16. Again the legislature held hearings as set forth in the statutes of 1915 quoted above, and once more fixed the rates according to the value of the property. The rate of tax for the Pullman Company was accordingly fixed at 3.95 per cent, a slight reduction from 4 per cent of the year before.

VALUATION NUMBER FIVE.

In 1916 there was in existence a State Tax Commission. That commission made another stock and bond valuation of all public utilities taxed by the state and also a new ascertainment of the average rate of local taxation. The report is an official, public document published according to law. Upon the basis of the facts as they then were, as shown by the new investigation, further adjustment of rates to

values were made by the legislature in 1917. These changes, again, were made upon precisely the same theory as the original rate fixing and upon the facts as they then appeared.

To Conclude the History.

Counsel for appellant in the court below called the attention of the court to certain criticisms of the present system of taxation made by the State Tax Commission of 1915–1917. They, however, failed to point out that the questions involved and the points criticised by the commission were wholly questions of public policy, and not of law. There was no question raised by that commission as to the legality or equity of the tax. That commission, for example, advocated increased land taxes upon a theory somewhat the same as that known as the "single tax" of Henry George, and also advocated an income tax. The 1915 commission's theory, political and financial, was very different from that of the very conservative commission of 1906.

But, even so, in all matters of law and in all recommendations as to rates, it adopted the theory and followed precisely the same methods as were followed in 1906, 1910, 1912 and 1914. The legislature, however, was not moved to any action whatever by the recommendations of the State Tax Commission's report as to policy, but followed consistently the same procedure as to existing taxes as in previous years.

In the historical study we have called the attention of the court to events happening subsequent to the imposition of some of the taxes called in question. In this we follow precedent set by counsel for appellant. We do so because the whole series of rates have been adjusted by one consistent theory and their adjustments illustrate and prove that theory.

Before finally leaving the historical matters we desire to call the attention of the court to the fact that the Commission on Revenue and Taxation of 1906 did not ignore the legal questions involved in their recommendation. They made a thorough and comprehensive examination of all the cases bearing upon the taxation of interstate public utilities from the beginning down to 1906, the date of their report, and printed at length the opinions and decisions which they found.

We reprint in the Appendix, for the convenience of the court, that part of the report which dealt with the legal question. (Appendix, p. 160, *et seq.*) We are sure that it will not only throw light upon the matters in hand, but will prove interesting in itself as a clear exposition of the state of the law as it was then and still is. We are glad that we are permitted to incorporate it, since it appears in a public document, as an integral and, we believe, an important part of our own brief.

RELIANCE UPON CLERICAL ENTRIES TO PROVE THE TAX AS ONE UPON GROSS RECEIPTS ONLY.

In the court below and in the trial court, plaintiff-in-error endeavored to prove that *gross receipts alone* were aimed at by the California tax system rather than property values, by citing the records of the State Board of Equalization containing such entries as:

> "Gross Receipts to December 31, 1910—$1,905,302.97"

and

> "Tax thereon under Section 14 of Article 13, Constitution—$57,159.08."

From such clerical entries plaintiff argued that it had produced conclusive proof of purpose to impose a tax on gross receipts alone. (No. 464, Tr. page 29.)

It will be remembered that the above cited record (year of 1911) was made the first year of the operation of the new system of taxation and the entry in a book by some clerk is hardly evidence of the purpose of the taxing authorities in devising such system of taxation.

Plaintiff-in-error attaches much importance to this entry but none to the following heading of the assessment:

> "Assessments of quasi-public corporations for property used exclusively in the operation of their business in the State of California" (No. 464, Tr. page 28.)

or the following:

"RECORD OF ASSESSMENTS FOR STATE TAXES FOR THE YEAR 1913.

"Assessments of quasi-public corporations mentioned and provided for in subdivision 'A' of section 14 of article XIII of the constitution of California for property used exclusively in the operation of their business in the State of California.

"Assessed to all owners when known, and when unknown to unknown owners.

"The word company and the word companies used in this record, include persons, partnerships, joint stock associations, companies and corporations.

No. of company	Name of company	Post office address
310811 Foreign, 1219	The Pullman Company	c/o John D. Fergussen, tax agent, Chicago, Ill.

(On outside cover of book)

Quasi-Public Corporations

Light, Heat, Power, Telegraph, Telephone, Express, & Car.

Description of Operative Property.

Real Estate Other Than City and Town Lots.

Subdivisions of Sections, Metes and Bounds, City and Town Lots, Improvements, Personal Property, Franchise.

"Contra Costa County: In the Rancho Pablo, lot 58 and portion of lot 59, bounded N. E. by Wall's addition to the City of Richmond, S. W. by the Pullman Townsite and W. by the west line of lot 59, containing 19.36 acres; and also in Wall's addition to the City of Richmond: lots 1 to 32, inclusive, in block 169, containing 2.31 acres, together with the repair shops and other buildings thereon situated, all of which are exclusively used by The Pullman Company in the operation of its business. All of said real estate is required for the convenient use and occupation of said repair shops and other buildings.

"And this assessment shall also include, and does hereby include, all other operative property, real and personal, as is set forth and contained in the report of said company on file with the State Board of Equalization, which report is hereby referred to and made a part of this assessment.

Gross receipts to ———	Tax thereon under section 14 of Article XIII constitution	Date of payment of first half of tax
$2,081,091.38	$83,,243.65	Aug. 12, 1913

First half of tax $41,621.83" * * *

A somewhat similar situation developed in *Wells Fargo & Co.* vs. *Nevada,* 248 U. S. 165, where the assessor entered in his books, as the action of the State Board, the statement that the tax levied was upon "the right to carry on an express business" in the state.

This court said:

"As construed by the state court, the statute under which the tax was imposed does not provide for a privilege or franchise tax, but only for an ad valorem property tax."

* * * * * * *

"Looking only at that entry there is strong ground for saying that the tax was laid on the privilege or act of doing an express business which was principally interstate. On the other hand, the action of the state board on which the assessment concededly was predicated, indicates

that what was taxed was the company's property in Humboldt County."

* * * * * * *

"The company insists that the state is concluded by the entry on the assessment roll. But the state court, as shown in its opinion, rejects that view and holds, in effect, that the entry must be construed in the light of the statute and the action of the state board, and that when this is done it is apparent that the tax was not laid on the privilege or act of engaging in interstate commerce, but on the company's property within the county. We perceive no ground for disturbing that ruling. In so far as it turns on the authority of the state board and the assessor under the statute and the relative effect to be given to their acts, it is not reviewable here, and in so far as it relates to what really was the subject of the tax, we think it was right."

* * * * * * *

At another time in the court below, plaintiff cited a statement by the State Comptroller in 1912 to the effect that:

"The taxes on the public utilities are based on gross receipts; those of banks on the stock, on insurance companies of the premiums, and on franchises they are ad valorem, the last being the only tax involving a valuation or assessment."

This statement is absolutely correct, as the Comptroller wrote it, for the franchises of ordinary mercantile corporations are the only properties on which the tax involves a valuation assessment *by that board.*

But this quotation was used by counsel to deny by inference that the other taxes are not on property and to prove that the legislature does not consider property values. This use of the quotation is unjustifiable and gives to it a meaning wholly false.

In this connection see

Miller & Lux vs. *Richardson,* 182 Cal. 115;
Pacific Coast S. S. Co. vs. *Richardson,* 186 Cal. 70;
State of California vs. *Ford Motor Company,* 63 Cal. Dec. 109;
Utah Construction Co. vs. *Richardson,* 63 Cal. Dec. 12.

FORFEITURE OF RIGHT TO DO BUSINESS.

In the court below counsel for appellant raised a point which appears to us to be irrelevant and immaterial. That point was stated as follows:

> "The tax on interstate commerce is void because of the provisions of the law forfeiting the right of the company to engage in business upon failure to pay."

(1) There being no "tax on interstate commerce," the argument is empty.

(2) If the tax be "a tax on interstate commerce" and is void on that account, the penalty is void and harmless.

(3) But if the tax before the court is valid, it should be paid anyway and the penalty for nonpayment is not an unusual nor an unduly severe method

of enforcement and collection. It must be borne in mind that the property of the company, the cars and the franchise, is all dedicated to a public use, is largely intangible, and that seizure and sale of the cars, after the manner customary with real estate for nonpayment or enforced collection of tax, would *per se* stop the business just as effectively as would the prohibition or forfeiture complained of. If the tax is valid, the state has the right to enforce collection.

(4) It is admitted that the state may forfeit for cause the right to transact intrastate business. The only question then is as to interstate business. So far, in these proceedings, the right to do interstate business has not been declared forfeited. If such forfeiture is illegal, it is a purely gratuitous assumption that the state authorities would do an illegal act, and still more a gratuitous assumption that the Supreme Court of California would sanction an illegal act. The company and its counsel have no ground for even assuming that the State of California, which has never done the thing complained of and alleged to be illegal, is going to do it if it is illegal, or that this court would permit it to do an illegal act.

(5) The State of California by its constitution has provided any taxpayer a full, free and adequate recourse and remedy for any injury he may suffer or thinks he suffers by the imposition of these taxes.

It has expressly opened its courts to tax suits of this character. See:

Constitution, Art. XIII, Sec. 14, par. (*g*);
Political Code, Sec. 3669*a*.

Finally, we repeat: Since there has been no forfeiture enforced or attempted, and since the Supreme Court of California may not be presumed to even intend to sanction any illegal forfeiture or other invasion of rights of any citizen, even if the statute should appear to impose one, the entire argument is irrelevant and immaterial.

We may further assure the court that it is not the intention of the Attorney General to ask for any *illegal* forfeiture of appellant's franchise or to attempt to interfere with appellant's right to do interstate business.

The very same point and a similar provision of the statute was considered by the Supreme Court of the United States in

St. Louis S. W. R. Co. vs. *Arkansas*, 235 U. S. 350.

It was held to be irrelevant on the following ground:

> "But the state court has not as yet construed the section as calling for the forfeiture of the privilege of doing interstate business in the event of nonpayment of the franchise tax; nor is the state here insisting upon such a construction * * *. *Non constat* but that the state court will hold, when confronted with the question, that the fran-

chise to be forfeited pursuant to section 20 is confined to intrastate commerce. * * * It is proper for this court to wait until the state has adopted a construction of the statute under attack, rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the federal constitution."

As further evidence that forfeiture of the right to do interstate business never has been contemplated, the legislature in 1917 amended section 3669*c*, Political Code, to read as follows:

"* * * that if the said taxes * * * are not paid on or before the Saturday preceding the first Monday in March, next thereafter, at six o'clock p. m. of said day * * * if the delinquent company be a foreign corporation it will thereupon forfeit its right to do intrastate business in this state."

This same provision limiting the forfeiture to the transaction of intrastate business only occurs several times in the same section.

That the legislature never intended the forfeiture of the right to do interstate business is borne out by this amendment; and certainly no such forfeiture or interference with the right to do interstate business could be attempted by the state authorities after the amendment of this section of the Political Code.

(6) No claim has been made by plaintiff-in-error that property other than used within California has been taxed, as was the case in

Western Union vs. *Kansas,* 216 U. S. 1;

and

Pullman Co. vs. *Kansas,* 216 U. S. 56.

Furthermore, as we have pointed out, the statute has been amended so that no misconstruction of the state's intent can occur, and if the resort to proportionate interstate receipts should be found unwarranted for the purpose of determining the value of the property used in securing such earnings, such decision would not be concerned with the penalty imposed by the state to pay a tax upon the same property measured by resort to intrastate receipts.

The Supreme Court of California in *San Diego, etc. Railroad Co.* vs. *State Board,* 165 Cal. 560, gave slight attention to the question and in this case dismissed the point as of no consequence.

In view of the decision of this court in the *St. Louis S. W. Ry.* case, we feel content that, especially in view of the attitude of the state officers and the amendments of the legislature of California, no alarm can be incited that interstate commerce will ever be interfered with by California for failure to pay the tax due to the State.

THE TAX IS NOT EXCESSIVE.

While, as we have shown, every effort was made and no pains spared by the legislature and by its advisors to ascertain the value of the property used by the Pullman Company in this state and to fix such a rate to be applied to the gross receipts as would result in a tax equivalent to the average rate of the

property tax on other property, we do not admit the theory that an exact determination of such equivalent is necessary to the legality of the tax. In fact, as we have heretofore shown, the power and right of a state to classify property, to levy different taxes upon different classes, and to adopt different methods of taxation with respect to the different classes of property, is at war with and contrary to any such theory. In California the state government has its domain of taxation and the counties, districts and municipalities have theirs. These domains are separate and apart. Equality as compared with similar classes of property taxed for state purposes is all that the company or any other taxpayer can justly ask. But, in its high sense of justice, the state legislature has gone even further and has attempted, to the best of its ability, to equate this tax and the others in the state system with the local taxes.

In the valuation of property for purposes of taxation there is always room for perfectly legitimate differences of opinion. No method of valuation of conclusive and irrefutable accuracy is known to man. Value can not be measured like length or weight. Hence, all that can be required of any assessing officer is that he shall use the best judgment he has without prejudice or favor. The records as to what was done in order to arrive at the rate of tax imposed on appellant are in this case particularly clear and complete, and show the utmost impartiality and care in

assessment. We have discussed fully the methods and results of the assessment in our review of the history of this tax. At this point we wish to refer merely to some very misleading figures used by counsel for appellant in the court below in an endeavor to create the impression that the tax is *per se* excessive.

Though we discuss and reply to this effort by counsel, we again call the court's attention to the fact that the complaints in the cases *make no issue upon overvaluation of plaintiff's property, make no allegation of excessive tax as compared with the value of the property taxed*, and the figures used by counsel in this branch of their argument were the assessment figures for the Panama-Pacific tax and county bond refund taxes and were introduced over defendant's objection that the evidence was not within the issues of the case.

We do not know whether counsel will pursue the same argument here, but in anticipation of the argument, submit the following passage from the *Cudahy* case (*supra*) as very pertinent in this connection:

> "Because the usual tax rate, if applied to the cash value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax upon the property. But the contention proceeds on an erroneous assumption. The state is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intan-

gible, constituting the car line used within its limits, and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately—enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value."

In the court below, the plaintiff-in-error pointed out the fact that in 1913 the Pullman Company was assessed for one tax at three million and two hundred and seventy thousand two hundred and forty-six dollars ($3,270,246) on an *ad valorem* assessment for the purposes of the Panama-Pacific Exposition tax and that during the same year the valuation of the property, following the gross receipts method as computed by plaintiff, was seven million two hundred and thirty-eight thousand, five hundred and seventy nine dollars and thirteen cents ($7,238,579.13).

As these figures, or others taken from the record applied to other years may be used by the plaintiff-in-error in this court for the purpose of comparison and as these figures will serve our purpose as well as any other, we desire to point out that the comparison is without force for two reasons:

First: The valuations on assessments compared are not of the same but of different properties. The

larger figure contains more property than does the smaller.

Second: The two sets of figures express two entirely different kinds of values, the smaller being the "Assessed Value," the larger being the "True or Actual Value."

The submission by plaintiff-in-error, as if comparable, of two figures, one referring to one amount of property and the other to a different amount and not made by the same method, but by methods distinctly predicated and intended to bring different results, cannot be of any particular value to the court in the determination of the question before us but if some such comparison be offered, we refer to the following historical and actual conditions of tax laws in the State of California.

THE REASON FOR CONTINUING AN AD VALOREM ASSESSMENT.

The court will recall that under paragraph (*e*) of section 14 of article XIII of the constitution, provision was made for a possible deficiency tax and also for reimbursement by the state to localities having bonds outstanding November 8, 1910, of the amount of bond taxes which they might otherwise have lost by the withdrawal from local taxation of railroad and other property.

Lest we be misunderstood, we hasten to repeat that the taxes computed on the gross receipts are in full of all other taxes and are completely *in lieu of all*

other taxes. They are the *only* taxes *paid* by the subjects of state taxation. The state itself pays the taxes technically or theoretically levied for bond reimbursement purposes on the assessments we are about to explain.

But for purposes of keeping and making up its accounts with its subordinate branches, the state keeps alive section 10 of article XIII of the constitution, repealed as far as any other purpose is concerned, and also all the provisions of sections 3664–3671 of the Political Code as they stood down to 1917, in which year they were amended by substituting the provisions of the state law as to state taxation. The same provisions, otherwise, as it were, in suspense, would come into full life and vigor if a deficiency tax proved necessary.

THE PANAMA-PACIFIC EXPOSITION TAX.

We digress for a moment to explain that there was for four years (after the constitution was amended establishing the new tax system) a special tax—the Panama-Pacific Exposition tax—levied on the assessed value of all property on the old plan or system. This came about as follows: At the first extraordinary session of the legislature in 1910 a constitutional amendment was proposed which was approved by the people in 1910, by which the people voted a tax of $5,000,000, payable in four equal annual installments of $1,250,000 each. This Panama-Pacific Exposition amendment was placed on the ballot for

ratification at the election in November, 1910, the same day that the taxation amendment was to be voted on and, since the adoption of the new system could not be foreseen, the exposition tax was, according to the provisions of the amendment, to be levied and assessed under the old law. This is the sole ad valorem tax levied for state purposes since 1910, and, since it was on all property, that taxable locally as well as taxable for state purposes, and for a special and limited purpose and time, it does not affect the status of the tax before us at all. It is not, and never was, a part of the state tax system under which appellant is taxed annually for governmental purposes.

Resuming after the digression, under these old laws the State Board of Equalization and the county and city assessors proceed each year exactly as they did prior to 1910 to make an assessment for bond refund purposes of the classes of property now taxed exclusively for state purposes. But since the resulting assessments are not subject to any tax to be collected from the companies assessed, they are carried, not on the regular assessment rolls on which taxes are to be collected are entered, but on a separate or supplementary roll known among the assessors as the "operative roll." The provisions for all of this are now to be found in section 3670*b* of the Political Code.

When the State Board of Equalization makes the assessment of the franchise and the right of way,

roadbed, rails and rolling stock of all railroad companies operating in more than one county and including the franchises and cars of the Pullman Company, it proceeds exactly as it did prior to 1910. Moreover, since this assessment is to be made the basis of a computation of taxes at the local tax rates, it follows the practice, deep-seated in custom, of assessment at less than full value.

THE PRACTICE OF UNDERVALUATION.

The practice of undervaluation for assessment purposes is universal all over the United States. The Census Bureau publishes comparisons of assessed to true value of taxable property. Students of taxation, like Adams, Bullock, Daniels, Plehn, Seligman and hosts of others, discuss it at length. Our several tax commissions and the State Board of Equalization have tried to measure it accurately. In its special report on the relative burden of state and local taxes in 1912 the State Board of Equalization, after an extended investigation, found the ratio of assessed to true value to average throughout the state 45.1 per cent. (See table, page 36, note at bottom, *special report* of 1912.) It found the ratio of taxes to *true value* of property taxed to be 1.1386 and the average tax rate to be $2.53 per hundred dollars of *assessed value*. (See foot of columns same table.) By consensus of opinion among officials, during the hearing before the legislature, these ratios were slightly revised on account of a shift in values in the

properties in Los Angeles city, and the ratio of 1.15 as the approved ratio of taxes to *true value*, and $2.55 as the average tax rate, was found to be correct.

THE FULL OR TRUE VALUE.

Now, returning to the figures: $3,270,346 is the *assessed value* fixed by the State Board of Equalization for appellant's franchise and cars alone. If raised to *true value* by assuming that the board assessed at exactly 45.1 per cent, or the same average as the assessors used, it represents a true value of about $7,251,000. To complete the comparison we should add to this the value of the *other operative property* assessed by the local assessors, but not taxed at all locally. What this is is unknown to us, but we do know that this property includes many acres of land and large repair shops near Richmond, California. The precise amount is not essential to the argument. Suffice it to point out that the above figure, $7,251,000, without the value of the other operative property (a figure which covers *only* the franchise and cars), exceeds the figure $7,238,579.13 so painstakingly computed to the last unlucky 13 cents by counsel for appellant as the "valuation" required as claimed by plaintiff-in-error to "produce a tax which would equal the gross earnings tax." In the Appendix we print a table taken from official reports showing the comparison of gross receipts to ad valorem taxes for all the years involved.

But let us for the moment return to the result of this assessment by the State Board of Equalization of the franchise and cars at $3,270,246.

The average tax rate was $2.55 per hundred. So the tax on that part alone would be about $83,390, which exceeds the tax actually paid of $83,243.66. Add to the $83,390 the sum which would have been paid under the property tax plan on property other than the franchise and cars, namely, the repair shop plant and supplies and other operative property in the state, and the excess is swelled.

The correct comparison would be either between (1) $3,270,246 *assessed* by the state board and increased by including the local *assessments*; and (2) 45.1 per cent of the $7,238,579.13 computed by counsel, or about $3,264,600; or it should have been between (1) the *true value* of the franchise and cars, or about $7,251,000 plus the true value of property assessed locally and (2) the $7,238,579.13. Better still would have been the straight away comparison of what the property tax would have been, namely, something considerably in excess of $83,390 and the tax actually paid, namely $83,243.66.

Far from showing the tax to be excessive, the very figures relied upon by counsel properly read show that the gross receipts tax was less than the property tax on the old plan would have been. They show, furthermore, the remarkable care and accuracy of the computation made for the express purpose of equalization by the legislature and its advisors as set forth more in detail below.

In the Appendix to this brief we print a table year by year based upon the assessment of plaintiff's property made by the State Board of Equalization for the purposes of the Panama–Pacific Exposition tax, the purposes of which have been heretofore explained. Using such assessments as a basis, we have applied thereto the average tax rate throughout the State of California and computed the annual tax of such ad valorem as would have been assessed against plaintiff's property under such system. We have also, for purposes of comparison, carried out in such table the total amount of tax that plaintiff required to pay under the "gross receipts" system. This table demonstrates that plaintiff was not unfairly treated by the state and that the "gross receipts" system redounded to the advantage of the plaintiff.

As supplementing the table printed in the Appendix, we deduce from the various transcripts on file in these cases the following figures and for the purpose of illustrating again not only the fairness, but the physical, practical and just working of the "gross receipts" system we print them in the following table and present them for illustrative purposes to the court.

Year	Assessed Value	Percentage of Actual Value	Actual Value	Value Ascertained From Percentage Gross Receipts	Under Valuation by Latter Method
1911	$2,995,760	45.1	$6,642,438	$5,020,112 00	$1,620,000 00
1912	3,070,654	45.1	6,808,500	5,148,426 13	660,073 87
1913	3,270,246	45.1	7,251,000	7,238,579 13	12,421 13
1914	3,459,920	45.1	7,671,600	7,227,781 25	353,819 25
1915	2,913,253	42.	6,936,300	6,009,143 88	927,156 22
1916	3,548,032	42.75	8,300,000	6,792,000 00	1,508,000 00

To such item of undervaluation must be added the operative properties locally assessed.

CONCLUSION.

In the foregoing brief we have endeavored to discuss the various phases of the litigation now before this court to that extent and in the order that seemed to us to be required by the magnitude of the subject, as well as the magnitude of the results dependent upon this litigation. The order in which the various branches of the case have been treated is, perhaps, somewhat arbitrary and the court will observe that at so many points the various phases of the case intermingle that repetitions of law or history occur from time to time in the brief. This condition, however, seemed unavoidable, by reason of the relation of the subject under discussion to similar points discussed in other portions of the brief.

We have endeavored to be as explicit in the history of the case as possible—not for the purpose of pridefully restating the work of our state commissions—but of comprehensively demonstrating its purpose and intent in the enactment of the statute, to the end that the real object of the various commissions might be thoroughly disclosed and the tax system of our state not destroyed by any failure upon our part to sustain its fundamental purpose upon the basis of the records that support it.

This desire on our part has extended this brief to an unexpected length, justifiable only in the purpose announced.

We believe that this review of the facts, the history of the legislation and the law applicable to the California tax system demonstrates:

1. That the tax is a property tax and not a tax on gross receipts;

2. That the gross receipts are adverted to merely as a measure or method of arriving at the value of the property used in this state;

3. That in applying such measure or method, "interstate receipts within the state" are properly included;

4. That the California method of taxing does not interfere with or place a burden upon interstate commerce;

5. That the tax is not excessive, and is not laid on any forbidden subject;

6. That the rates of taxation have been fixed not only with due regard to the value of the property taxed, but with equal regard to the equation of the burden of taxation between all taxpayers.

We submit that the judgments should be affirmed.

U. S. Webb,
Attorney General,
State of California,
Raymond Benjamin,
Special Counsel for the
State of California.

APPENDIX.

ASSESSMENT BY STATE BOARD OF EQUALIZATION.

Assessment of Pullman Company's cars and franchises by State Board of Equalization and estimated amount of tax thereon if levied at average tax rate, compared with taxes paid on basis of gross receipts. These figures do *not* include assessment of valuable operative property assessed by local assessors.

Year	State Board assessment	Average tax rate	Ad valorem tax would have been	Gross receipts tax was
1911	$2,995,760	[1]$2.53	$75.793	$57,159 08
1912	3,070,654	[2]2.53	77.687	58,619 98
1913	3,270,246	[2]2.55	83.391	83,243 66
1914	3,459,920	[2]2.90	100.338	88,056 06
1915	2,913,253	[3]2.91	84.778	73,209 40
1916	3,548,023	[3]2.824	100.196	82,115 94

[1]State Board of Equalization special report of 1912.
[2]State Board of Equalization special report of 1912.
[3]State Board of Equalization special report of 1912, revised by special committee of 1915.
[4]Estimated on basis report of Tax Commission of 1915-17.
[5]Report of Tax Commission, 1915-17.
[6]Report of Tax Commission, 1915-17.

REIMBURSEMENT OF COUNTIES.

CHAPTER 601.

An act to provide for the reimbursement of counties in this state, which sustain net loss of revenue by the withdrawal of railroad property from county taxation, under the provisions of section fourteen of article thirteen of the constitution of this state.

[Approved April 26, 1911; Stats. 1911, p. 1133.]

SECTION 1. There is hereby appropriated out of any money in the state treasury not otherwise appropriated, for each fiscal year hereafter to and including the fiscal year ending June thirtieth, one thousand nine hundred eighteen, the sum of one hundred and thirty thousand eight hundred and ninety-seven dollars for the purpose of reimbursement of counties in this state which sustain net loss of revenue by the withdrawal of railroad property from county taxation under the provisions of section fourteen of article thirteen of the constitution of this state, and as provided in section thirty of an act of the thirty-ninth session of the legislature entitled, "An act to carry into effect the provisions of section fourteen of article thirteen of the constitution of the State of California as said constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations for the benefit of the state, all relating to revenue and taxation."

SEC. 2. The counties which sustain net loss of revenue, by the withdrawal of railroad property from county taxation under the provisions of section fourteen of article thirteen of the constitution of this state are the counties of Imperial, Madera, Nevada, Placer, San Bernardino, Siskiyou, and Yuba, and the amount of net loss of revenue which said counties sustain by the withdrawal of railroad property from county taxation is as follows: Imperial $21,054; Madera $2,478; Nevada $5,861; Placer $36,304; San Bernardino $52,987; Siskiyou $5,045; Yuba $7,172.

SEC. 3. The controller is hereby directed to draw his warrant in favor of each of said counties for the amount of net loss of revenue to said counties respectively, in equal installments at the time and in the manner provided for settlement between treasurers of the counties or cities and counties and the state controller, by section three thousand eight hundred and sixty-six of the Political Code and as is required by the provisions of section thirty of an act of the thirty-ninth session of the legislature entitled "An act to carry into effect the provisions of section fourteen of article thirteen of the constitution of the State of California as said constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations for the benefit of the state, all relating to revenue and taxation," and the state treasurer is directed to pay the same.

SEC. 4. This act shall take effect immediately.

REIMBURSEMENT FOR BOND TAXES.

CHAPTER 533.

An act appropriating money for the purpose of payment of that part of the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district, on the eighth day of November in the year one thousand nine hundred and ten which is provided in section fourteen of article thirteen of the constitution of this state and as provided in an act of the thirty-ninth session of the legislature entitled, "An act to carry into effect the provisions of section fourteen of article thirteen of the constitution of the State of California as said constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations for the benefit of the state, all relating to revenue and taxation."

[Approved June 7, 1913; Stats. 1913, p. 916.]

SECTION 1. There is hereby appropriated out of any money not otherwise appropriated the sum of one million four hundred thousand dollars for the purpose of payment of that part of the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district, on the eighth day of November in the year one thousand nine hundred and ten, as is provided in section fourteen of article thirteen of the constitution of this state and as provided in an act of the thirty-ninth session of the legislature entitled "An act to carry into effect the provisions of section fourteen of article thirteen of the constitution of the State of California as said constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service corporations for the benefit of the state, all relating to revenue and taxation," and of said moneys hereby appropriated the sum of seven hundred thousand dollars shall become available July 1, 1913, and the sum of seven hundred thousand dollars shall become available July 1, 1914.

SEC. 2. The state controller is hereby directed to draw his warrant for said sum, or so much thereof as may be necessary for said fiscal years, in the manner and at the times and as is required by the provisions of section twenty-nine of an act of the thirty-ninth session of the legislature entitled "An act to carry into effect the provisions of section fourteen of article thirteen of the constitution of the State of California as said constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations for the benefit of the state, all relating to revenue and taxation," and the state treasurer is hereby directed to pay the same.

SECTION I.

THE FINDINGS.

The more important findings of the Commission are as follows:

A. Faults in the old system.

1. In general the present system of taxation does not meet the demands made upon it. It is antiquated, having been adopted fifty years ago, and has not been revised to keep pace with modern conditions.

2. It is full of inequalities, which impose a handicap on the growth of the State, a handicap which only the vigor and inexhaustible energy of our people can carry.

These inequalities twist and distort our industries and prohibit a symmetrical development of our resources. They place an undue burden upon agriculture especially—the foundation of our wealth, the one industry which most fully exploits the great natural resources of the State.

3. The taxes paid by farmers in California are equivalent to an income tax of 10%. This is in contrast to many other industries; for example, the taxes paid by manufacturers, which amount to only 2% on income. The persons engaged in agriculture, with an average yearly income of about $500, pay $50 per capita per annum in taxes. The persons engaged in manufactures, with an average annual income of $870, pay $17.50 per capita per annum.

4. Our chief tax, called a *general* property tax, has in fact become a real estate tax. Only from 15% to 18% of the entire taxes are levied on personal property.

5. The amount of personal property on the tax rolls to-day is hardly larger than it was in 1872.

6. Money and credits escape taxation almost entirely. Our laws in regard to the taxation of this class of property are full of absurdities and utterly unenforcible. It is unwise to retain these provisions on the statute books.

7. National banks pay no taxes at all, except on real estate, of which they are not permitted to hold much, by the provisions of the Federal laws.

8. State commercial banks, subject to our tax laws, are badly handicapped by the competition of the untaxed national banks. Many of them have become national banks partly for the reason that they would not then be subject to taxation.

9. State commercial banks, to live at all, in face of this competition, are forced to evade taxation whenever possible and are hampered in their investments by unwise provisions of our tax laws.

10. Savings banks, which harbor the savings of the workers, and which are, in many states, granted special rebates in taxation on that account, are the only class of banks which pay their full quota of taxes.

11. "Equalization," so-called, does not equalize, and in the nature of things, can not equalize. After the officers have exhausted their best efforts in this direction there are inequalities—glaring ones—between real estate and personal property; between different classes of personal property; between county and county; between city and city; between city and county; between man and man. All of which are rarely removed and often intensified by so-called equalization.

12. The original inequalities in the assessment are intensified by the constant piling up of tax on tax on the same base. If a city has a rate of $1.00 which may be "reasonable" enough, there often comes on top of that a county tax of another $1.00, a few special school taxes, or a sewer tax, or a tax for bonds, or a levee tax, or a drainage tax, etc., etc., until the effects of any inequalities in the original assessment have been multiplied anywhere from two to five fold. Aggregate tax rates falling on city property range from $1.65 per $100 to $5.00 per $100 of assessed valuation.

13. Counties with relatively undeveloped resources often have very high tax rates on relatively high valuations, while some of the richest counties enjoy a low tax rate on low valuations.

14. The present system takes the revenue derivable by taxation from large general organizations, like the railroads, which revenue belongs by right to the people of the State at large, and distributes it most inequitably among the local divisions of the State which have no proper claim to it whatsoever.

15. Under the present system it is impossible to adjust the burden of taxation equitably between different classes of corporations.

16. Our present system is a "school for perjury," puts a penalty on honesty and pays high premiums for dishonesty.

Our present system is so embodied in our Constitution that it can not be bettered without a constitutional amendment.

Assessment of railroad property.

The property of railroads above referred to as being assessed or valued by the State Board of Equalization, consists of the franchises, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. The assessment of this property, made by the State Board of Equalization, is apportioned to the counties and other subdivisions in proportion to the number of miles of railway in each county or subdivision thereof. The apportionment to the counties is made by the State Board of Equalization, while the boards of supervisors in each county make the apportionment to the lesser taxation districts.

While in the main these provisions make a fairly clear distinction between the subjects which are to be assessed by the State Board and those to be assessed by the county assessors, some conflicts of authority have arisen. Some of the more important points have recently been decided by the Supreme Court in the case of *San Francisco & San Joaquin Ry. Co.* vs. *City of Stockton.*

Under this decision *all* improvements erected on space covered by the right of way, as well as tangible property lying outside the limits of the right of way, even though such improvements and property be absolutely indispensable to the operation of the road, are locally assessable. Roadway is taken to mean the continuous strip of land upon which the road is constructed, and Civil Code, Section 465, subdivision 4, does not broaden this term, when it authorizes railroads to lay out their roads not exceeding nine rods in width and to construct and maintain the same with such appendages and adjuncts as may be necessary. Land for cattle yards, switch yards, and depots are not roadway and are locally assessable. Unfinished tracks intended for future roadway are locally assessable.

CHAPTER I.

SEPARATION IN GENERAL.

Introduction and definition.

The separation of State from local taxation as to sources of revenue has come to be generally recognized as the one feasible pathway for tax reform.

As this Commission uses the term "separation of sources" it means that the counties and local governments shall tax only the private or individual real estate and tangible property within their boundaries, property, that is, which is clearly and distinctly localized. This class of property has a distinctly local situs and benefits obviously and directly by local government. Upon this class of property there shall ultimately be no State tax. The State, on the other hand, shall tax all those industries, and classes of property sometimes called "corporate" to distinguish them from the "private or individual" industries and properties. Such property does not have, in the same sense, a local situs; it extends over many communities, serves all, and all contribute to its income. Steam and electric railroads, telegraph and telephone companies, express companies, insurance companies, banks, trust and loan companies, light, heat and power companies, and even certain manufacturing and trading companies with branches in different localities, all of these have no distinct local situs, as does a piece of land, or a business block. The characteristic of all such corporate enterprises is that the value of the business which they carry on in any particular municipality is more or less intimately dependent upon the business carried on by them in one or more other municipalities, rural or urban, and can not, therefore, be properly estimated or taxed in any one place, or even in a series of places. Such property and industries are general. They belong to the people of the State as a whole, not to any particular community in which by accident their rails, wires, or offices may be.

The general, non-local, character of corporate property is so obvious that it seems almost superfluous to argue that the taxes thereon do not belong to the localities. But as this idea is comparatively new in practice it may need illustration. A carload of butter and cheese may be shipped from Humboldt county by water to San Francisco and thence by rail to New Orleans. On its way it will pass through

many counties. We should hold it robbery if each county erected toll-gates and collected tolls on that carload of Humboldt products. But that is practically what we allow when we permit the counties to tax the railroads. Or, again, a vineyardist in Napa may ship a cargo of wine to London; a San Francisco bank buys the bill and "finances" the operation. San Francisco in taxing the banks virtually levies a toll on the Napa vineyardist's goods. Every year the banks bring in large sums of money to "move the crops." This money goes all over the State, even into localities where there are no banks. Every producer in the State contributes to the profit which the banks make on the transaction. Why should this business be taxed in San Francisco, Stockton, Sacramento or Los Angeles only? The business is general, and the taxes on it should be for the support of the State government, which represents all the people and all parts of the State alike. Does the fact that San Bernardino county, Nevada county, and Siskiyou county sit at the gateways through which the railroads enter the State give them a right to tax every yard of cloth, every box of crackers, every plow, and all the other multitudinous wares which the people of this commonwealth bring in? Many counties not situated on the line of any railroad nevertheless contribute to its traffic. By what right are they to be deprived of the taxes levied on this traffic? If the railroads are taxed by the State alone and for State purposes alone, every dollar of taxable property in the State, whether on the line of the railroad or not, is benefited, for the amount paid into the State treasury from this source lessens the tax on all property in the State.

The right to do business that is enjoyed by corporations is a privilege granted by the State, and not by the cities or counties. Therefore, any tax that may be levied upon the revenues derived from the enjoyment and use of the State privileges used by corporations, especially public-service corporations, ought to be paid into the State treasury for the support of the State government, from which the privileges are derived rather than into city and county treasuries.

Obviously there is a perfectly clear line of demarkation between property local in character which should be subject to local taxation and property or industries general in character which should be subject to general or State taxation.

To accomplish separation it is necessary to define clearly and sharply the boundary line between State and local powers of taxation. This boundary line have been once defined, neither of the two parties shall trespass upon the territory set apart for the other. It implies that there shall be an end to the everlasting piling up of rate on rate on the same subjects or the same foundation, which is the bane of our present system of taxation.

Separation will give the counties substantial home rule in matters concerning their own taxation, and to the same extent there will be home rule in matters concerning city taxation.

Within strictly defined limits the county, or, respectively, the city, should be permitted to determine its own policy concerning the raising of revenue. This does not preclude general laws intended to bring about a certain amount of uniformity as to methods, but it does preclude that constant deference to the affect of State or other sur-taxes which tends to divert the attention of the assessing officers from their primary duty, which is to establish uniformity and equality of taxation between man and man. It is indisputable that separation would abolish the chief incentive to and cause for undervaluations and remove the chief source of the existence of discriminations.

Separation would at once abolish all the evils which "equalization" is intended to prevent, but which it unfortunately fails to remedy.

The crude assumption that each and every interest should be taxed in the same way in proportion to the property which it uses is one of the fundamental iniquities of our present system. This it is which prevents us from taxing each interest in accordance with its ability to pay.

Theoretical considerations.

The theoretical principle for the separation of State from local taxation is found in part in the natural distribution of functions between State and local governments. The activities of the local governments, such as the protection of property by the police, the fire departments, the local courts, the construction and maintenance of roads, streets, bridges, and the like; the provision for schools, the care of the sick and of the poor, redound distinctly, directly, and peculiarly to the benefit of local real estate owners or local industries, and enhance and sustain the value of real estate and of other tangible property in the localities. This has always been the ground for making local governmental expenses a local charge. Separation makes no change in this respect, but it does propose to relieve local property from State taxes and from the expenses of general activities, the benefits of which are not directly traceable to the activities of the local government.

In the counties outside of the cities, the chief local industry is agriculture, and it seems peculiarly fitting that the local industries should bear the expenses of its own protection and support the local charges. There is probably no better way of apportioning the taxes among a group of farmers for the support of the charges of the local government than by the taxation of real estate. The property tax originated as a neighborhood tax, and works best when used to apportion neighbor-

hood charges among neighbors. It can be made effective only among a group of persons who know each the other's affairs to a large extent, and where deception and concealment is not easy.

In cities, generally, it is the growth of the city that gives value to real estate. This may be admitted without going the full length of the claims of the single taxers, that it is the activities of the city alone which gives value to real estate. From either point of view it seems proper that such property should bear the greater part of the expenses of the city which creates its value. Strong arguments have been advanced in support of the contention that the local expenses should be *limited* to the amount which the local real estate can afford to pay; whether these arguments are valid or not, they point the conclusion that real estate should pay the local expenses.

On the other hand the activities of the State are all broad and general. This is uniformly recognized in the constitutional provisions now found in almost all State constitutions prohibiting local or special laws. The duties of the State are mainly legislative. It provides a uniform code of laws, the same throughout its entire territory. It provides laws under which business is conducted. It grants charters to industrial and other corporations. It administers such public institutions as are in no sense local in character. In general the State cares for all those interests that are too broad or too large for the local governments to handle.

Corresponding almost precisely to the general activities of the State government, we find the properties and business of the great public service corporations which pervade the whole State, such as the railroads, the telegraph and telephone companies, the express companies, and, of late, the light, heat, and power companies, which have spun their wires like a spider's web over many communities, or the insurance companies and the banks, whose business is in no sense confined to one locality. These industrial corporations are distinctly and peculiarly the creatures of the State, and it is to State, and not to the counties or the cities, that we naturally turn for their regulation and control. They serve the people of the State as a whole, and are prohibited from bestowing favors on any one community. There is little or nothing localized about them, nor do they benefit, save, possibly, in so far as their local franchises are concerned, in the same peculiar and direct manner as does private individual real estate by the activities of the local government.

There is, thus, ample theoretical ground for making a separation as to the sources of State taxation from those of local taxation. The general classes of corporations which we have had under consideration are so broad in their activities, their stockholders, and, including for the nonce the oft forgotten consumers of their products, or of their

services, are so widely scattered that the propriety of taxing them, where, by some accident of organization or of legal enactment, their head office may be or their property may lie, is clearly illogical.

Practical considerations.

The practical reasons for the separation of State from local taxation are:

1. Complete separation will abolish at once the expense, friction, and annoyance of the vain attempt to equalize between the different counties. Partial separation will lessen this evil, because as the proportion of State taxes to the total tax burden on each citizen is reduced the inducement to undervaluation is reduced in like proportion.

A large part of the inequalities in the assessment have their origin in the attempt of assessors to save part of the State burden to the county by undervaluation.

The State assessment roll in California is, as a consequence of the prevailing tendency to undervaluation, practically at a standstill.

From 1850 to 1860 the assessed valuation increased from $57,000,000 to $148,000,000, or at the rate of 16% per annum.

From 1860 to 1870 the increase was at the rate of 8.7% per annum.

In 1872 the codes were adopted and the State Board of Equalization established. Such was the activity of this board and the efficiency of the new law that the assessment increased by 130% in two years, from 1870 to 1872.

From 1872 to 1880 the increase was only at the rate of 1.3% per annum.

From 1880 to 1890 the rate of increase was 6½% per annum.

From 1890 to 1900 only 1.1% per annum.

From 1900 to 1902 the roll increased 3% each year.

In 1903, after great efforts by the State Board of Equalization and slashing increases in many counties, the roll reached nearly $1,600,000,000. It dropped back about $50,000,000 the next year, and this (1905) year has gone to $1,625,000,000, a gain of 1½% in two years, or an average of ¾ of 1% per annum for the two years.

No one will assume that this represents the true increase in the wealth of the State in the past two years.

2. When separation is permitted it is possible to place each tax in the hands of that branch of the government which is best adapted to administer it. The taxation of public-service corporations, for example, whose business pervades the whole State, can not be adequately handled by the local assessors. In every case, in order to obtain any sort of equality, uniformity, and justice in the treatment of these great corporations, it is necessary to call in the assistance of a State board, even if the resulting taxes are distributed among the localities. This is one

of the several points at which the general property tax breaks down, and in which our present administrative organization in California is especially weak. If we have separation of sources the State alone would deal with these corporations. This would save a great amount of friction and more or less expense.

The different classes of corporations can not all be successfully taxed by one and the same method. That has been partly recognized in California already in the taxes imposed on the premiums of insurance companies. The local assessors and other administrative officers, engaged, as they necessarily will be, largely in the administration of the local taxes, can not safely or wisely be entrusted with the administration of several other sorts of taxes. Nor have these officers in the past shown any ability to handle the administration of broader matters concerning taxation. What is needed is separate machinery for the administration of each of the different taxes.

3. The different taxing districts could each have practical "home rule" in matters relating to taxation. There would no longer be any object in underassessment if there were no State tax, or but a small one, to be apportioned to the counties on the basis of the assessment made by the county assessor. If for any reasons peculiar to its local conditions, one county preferred to have a high rate of assessment and a low nominal tax rate it could do so without assuming more than its fair share of the State burden. If another county preferred to have a low assessment and a high nominal tax rate it could do so without evading any portion of its obligations to the State. If for any reason a county preferred to have its assessment roll revised once in several years only, it could do so without damage to any other community and with a considerable saving in expense to itself. Other advantages in this connection will suggest themselves.

If each branch of the government collecting taxes did so independently of the action of the others there could be no clashing of adverse interests, and the administration would be much simpler and more economical.

To secure uniformity in the distribution of the burden and equality between different classes when taxes are levied by different authorities is the function of the general revenue law of the State.

Separation in other states.

Many of the Eastern states have introduced the plan for separation of State from local taxation. Pennsylvania was the pioneer in this line, and has had such a system in force for many years. New York has, after 25 years of gradual evolution, attained a similar position. We have selected these two states, together with Connecticut, Ohio, and Minnesota, each with more or less complete separation, to illustrate the way this plan works in other states.

CHAPTER III.

GROSS EARNINGS TAX IN THEORY AND PRACTICE.

Gross earnings taxes recommended.

The Commission recommends that the taxes to be levied on public-service corporations shall be in proportion to gross earnings. The reasons for this recommendation must be made clear, for a large part of the plan of reform depends upon them.

It is furthermore certain that, as this is an innovation in California, many persons will desire to satisfy themselves as to whether the rates recommended for taxes to be levied in proportion to gross earnings are just and fair compared with other taxes.

It is the purpose of this chapter to bring these matters together.

Theory demands net earnings tax.

Theoretically all taxes, by whatever method they may be levied, should be apportioned among the taxpayers of every class according to net income. Theoretical writers on taxation have never advanced beyond the idea embodied in Adam Smith's famous dictum: "The subjects of every State ought to contribute toward the support of the government, as nearly as possible, * * * in proportion to the revenues which they respectively enjoy under the protection of the State."

Practical difficulties of net earnings tax are insuperable.

But practically it has proven impossible, without resorting to methods too inquisitorial to be consonant with that freedom of the individual, which is so jealously guarded under our system of government, to ascertain the net income of individuals for the purpose of levying taxes thereon.

There are two possible good substitutes for the theoretically good but practically unworkable tax on net income. One is a tax on the property, the other a tax on gross earnings. We know by bitter experience that the tax on property fails, especially where large corporate interests are affected. A tax on the gross earnings, at rates for the different classes of corporations which recognize in a broad general way the differences in the proportion of net earnings therein, is the substitute recommended by this Commission, in certain cases in which it seems to be practicable and equitable.

The justice and equality of a gross earnings tax.

It is not claimed that the gross earnings tax will be absolutely just and equitable in its effect upon each corporation in each of the different classes. No tax system has ever been devised which is strictly just. *But it is claimed that in certain cases such a tax would result in a far closer approximation to justice and equality than any other tax which this State could select.* The burden of taxation imposed thereby will vary from year to year as the fund out of which the taxes must be paid varies. A careful examination of the effect of the taxes, at the rates proposed, upon the individual corporations shows that the differences are practically unimportant.

The very able Ontario Commission on Railway Taxation, which reported in 1905, says:

> Finding, then, that the gross earnings tax would cause no substantial inequality in the case of the roads operating in Ontario, and that, as regards equality, there is little to choose between taxing on the gross and on the net earnings basis, the choice between these might very well be determined on the ground of facility and certainty in ascertaining what is gross and what is net revenue. But there is very little difficulty and dispute in determining what is gross revenue, while there is endless difficulty and dispute in determining what is net revenue, especially where it is to the interests of the companies to minimize net revenue in order to escape taxation. Hence, there would seem to be no hesitation in selecting gross revenue as the simplest and most direct, and, considering all the roads, the most equitable basis for taxation.
>
> The essential fairness of taking earnings as a basis for the taxation of corporations is based on the general principle that the taxes vary with the capacity of the company to pay them, whereas taxation on the basis of general property results in all manner of inequality. The amount of tangible property required by the various corporations has, in the first place, no necessary relation to their relative earning power, and, in the second place, bears no accurate relation to the earning power of the same company at different periods. The capital stock tax has something of the same defect in addition to those already mentioned, yet it has a certain amount of flexibility. Only the tax on earnings follows automatically the capacity of the corporation to pay, and while even it has its inequalities, yet it is very much more equitable than any other practical system.

Practical advantage of a gross earnings tax.

Taxation is of necessity largely a matter of expediency, and practical considerations naturally outweigh theoretical ones. The advantages of a gross earnings tax on public-service corporations are largely practical. They are: (1) *Certainty and ease of administration.* Gross earnings can be concealed or misrepresented only by outright and easily detected fraud. Unlike property values or net earnings they are not affected by differences of opinion and depend on nobody's judgment or discretion. They are often a matter of published record. After the gross earnings are determined the rest is a matter of mere arithmetical computation. (2) They follow the capacity of the taxed subject to pay. (3) They enter every year in the same proportion into the accounts and can be computed in advance. (4) They are less likely

to be shifted from the taxpayer to some one else than any other tax.

(5) In the words of the Ontario Commission above referred to:

> One of the most important advantages of the gross earnings tax is that *it does away with the difficulty about the taxation of franchises.* Probably no aspect of modern economic wealth has given rise to such elaborated and confused discussion and even outlandish theorizing as the so-called "franchise" values. Without attempting to follow the lines of popular discussion on the subject, it may be sufficient here to indicate briefly that there are two distinct senses in which the term "franchise" is used to indicate a property or economic value. It is the confusion of these two economic phrases, with the occasional introduction of purely legal aspects of franchise, which has contributed so much to the darkening of counsel on the subject.

HOW TO DETERMINE THE RATES FOR GROSS EARNINGS TAXES ON THE DIFFERENT CLASSES OF CORPORATIONS.

Equal taxation.

In all of those states in which, in recent years, a change has been made in the taxation of public-service corporations, either from the ad valorem system to a gross earnings tax, or from a gross earnings tax back to an ad valorem system, or in which any substantial change or reform has been suggested in regard to the taxation of public-service corporations, the question has always been raised whether the proposed rates or methods of taxation for such companies would result in "equal taxation." It is difficult to determine exactly what is meant, in this connection, by "equal taxation," but in the popular mind, as expressed during the discussions of such proposed reforms, there has been an idea that, by whatever method a railroad, for example, may be taxed, the burden of taxation thereon should be, and must be, as heavy as that which is borne by a farmer or by an owner of real estate and personal property on the regular assessment rolls. The idea seems to be that if the tax is levied upon the gross earnings, it must result in the imposition upon a railroad or other public-service corporation of a burden fairly equal to that which it would bear if fully assessed on an ad valorem basis as any other property might be.

In view of the strength of the popular feeling that taxes should be "equal," and of the obvious and essential justice of such a demand, it is highly important to discover a practical method for determining whether the burden of a tax which it is proposed to impose upon the gross earnings of a given class of corporations is the equivalent or not of a tax which might be levied under an ad valorem plan. Such a method has been devised by this Commission. By the application of this method we can ascertain what rate of tax on the gross earnings is the equivalent of a given tax rate on the property, and *vice versa*. This will make it possible to compare any proposed gross earnings tax with an assumed "fair" rate on property.

Briefly stated that method is: To determine what tax rate on gross earnings is the equivalent of a given rate on the property, for a given class of public-service corporations, (1) ascertain what percentage of the gross earnings is net, (2) ascertain what rate of interest would constitute a fair return to investors in the securities of the class of public-service corporations under consideration, then (3) divide the percentage of net earnings by the rate of interest and multiply the result by the given tax rate on property.* *This method is not as rigid or as infallible as the mathematical statement of it might seem to imply. There is still room for difference of opinion.* But it has been found of great practical value in testing the probable effect of different rates on any set of assumptions.

Classification of corporations.

The first step in the application of this method by the Commission was the determination of the class to which a corporation belongs by virtue of the percentage which its net earnings bears to its total gross earnings. An examination of the accounts of different classes of public-service corporations showed that they fall into very distinct classes according to the percentage which their net earnings bear to their gross earnings. This does not mean that every company belonging to a given class has the same percentage of net earnings to gross. But merely that *each of the great classes of public service corporations presents a type* to which the individual companies tend to conform, and from which they differ only while young or while for some other reason incomplete or imperfect.

Thus, for example, we found that railroad companies, operating steam railroads, normally pay about 64% of their gross earnings for operating expenses, leaving 36% to pay interest upon bonded indebtedness, dividends upon capital, and similar items. That is, out of every $100 received, $64 goes to pay for wages, fuel, maintenance of way and equipment, and other items of cost involved in operation, and $36 is left for payment of interest on bonds, dividends on stock, and similar items. It is this $36 which gives value to the property. For fifteen years this average rate had not varied in the United States as a whole more than two points. City water companies, to take another example, ordinarily have a very much lower percentage of operating expenses, often as low as 25%, and consequently have as high as 75% net earnings, or funds available for the payment of interest and dividends. Other classes of corporations again, such as the telephone companies and express companies, have relatively high operating expenses and

*Expressed algebraically, let t equal the tax rate sought, n equal the percentage of net earnings to gross, i equal the interest rate on the investment, and r equal the given tax rate on property, then $t = \frac{n}{i} \times r$.

only a small proportion of net revenues. As it is the amount of net revenue which determines the value of the property of these corporations, as of any other property, so on the well-known principle of "capitalizing" the income at a predetermined or agreed rate of interest, it will be readily seen that a corporation with net returns large in proportion to its gross earnings has a larger property or capital value than one with a smaller percentage of net earnings. For example, as has been said, railroads earn about 36% net out of all receipts, and if this were capitalized at 6% would have $600 of capital for every $100 of gross earnings; another class of corporations earning, say 24% net, would, if capitalized at 6%, have $400 worth of property for every $100 of gross income, while a city water company with 60% net, if capitalized at 6%, would have $1,000 worth of property for every $100 of gross income. If, however, 8% be taken as the rate of interest constituting a fair return to be allowed the stock and bondholders upon their investment, and as the basis for capitalization, these sums would change, and railroads with 36% net would have $450 of capital for every $100 of gross earnings; a company with 24% net would have $300 of capital for every $100 of gross earnings, and a water company with 60% net would have $750 for every $100 of gross earnings.

Computing the tax rate.

In order to compute what rate of taxation on gross earnings is the equivalent of a given rate of taxation on the property, we have simply to divide the percentage of net earnings by the assumed rate of capitalization and multiply the result by whatever tax rate on the property we wish to compare the gross earnings rate with. Thus, for example, if we wish to impose, in the form of a gross earnings tax, a burden which shall be the equivalent of a tax of 1½% on the property, then in the case of a railroad, taking the figures assessed above, we divide 36 by 6 or 8, whichever shall be determined upon as a fair rate at which to capitalize railroad earnings, and multiply the result by 1½, obtaining, at 6%, 9% as an equivalent rate on gross earnings, or at 8% as a basis of capitalization, 6¾%. If the tax rate on property or capital were fixed at 1%, the above rates would become 6% and 4½%.

Net earnings defined.

In applying the above method it is obvious that we must have a fixed and uniformly applied definition of what constitute net earnings. Since the object of ascertaining the net earnings is to ascertain from them the value of the property, it is obvious that the net earnings should include all things and only such things as belong to the owners of the property, whether they be the stockholders, or the bondholders, or the lessors of property used by the corporation. Hence the

operating expenses, which are deducted from the gross earnings in order to ascertain the net earnings in this sense, should include only the bare expenses of operation and of maintenance to the narrowest sense of those terms. The operating expenses would include, in the case of a railroad, only the items which are denominated and defined by the Interstate Commerce Commission as "maintenance of way and structures," including: "repairs of roadway and renewal of rails and ties," "repairs and renewal of bridges and other structures"; "maintenance of equipment," "conducting transportation," including: "salaries and wages in the operating department," "supplies," "car mileage," "switching charges," "damage for injuries," "advertising," "outside agencies and commissions"; and "general expenses." They would not include: "taxes," "rental of tracks and terminals," "interest on bonds," nor "balances available for dividends." These terms, so far as they apply to railroads, have been carefully defined, for the United States at large, by the Interstate Commerce Commission, and for California by our own State Board of Equalization, and in general are fully understood and applied by all more careful accountants. Precisely analogous items are carried in the accounts of almost all public-service corporations, and the accounts can always be segregated under similar divisions.

Rents or rental charges not included among operating expenses.

Some corporation officers have argued before the Commission that rent is an operating expense and should be deducted before the net earnings are computed. This rests on a fundamental misconception of the purpose of ascertaining net income. If net income is to be used to determine the rate of a tax on gross earnings, such tax to be *in lieu of all taxes on* PROPERTY USED IN OPERATION by a corporation, all net income accruing to that property or from its use must be included. All persons readily admit that interest on bonded indebtedness is not an operating expense; if that is the case, rent is not an operating expense. It would have made no difference, so far as this matter is concerned, whether the Southern Pacific built the Lucin cut-off, as it did, with the proceeds of bonds on which it pays a certain sum annually as interest, or had leased that great bridge from some other company, paying the same sum annually as rent. In neither case would the annual payment be an operating expense; in each case it is a return to property.

Annual payments on account of the franchise.

In the same way, and even more fallaciously, corporation officers, especially street railroad officers, have argued that they should be allowed to deduct from the amount of taxes due the State any payments made to the cities on behalf of the franchises. This argument is even more shallow than the preceding one; it is, in fact, little short of absurd.

It rests upon the mere accidents that these payments are sometimes miscalled taxes and are usually measured by the gross earnings. As a matter of fact, these payments are rentals, for the use of a certain kind of public property, namely, the streets. It is quite as absurd for a street car company to call these "taxes" and ask that they be allowed to subtract such payments from their taxes due the State, as it would be to call the rents paid for office buildings taxes and ask to have them deducted.

A street car or other public-service corporation can acquire its franchises from cities in one of two ways: (1) it may buy them outright for a certain sum down in which case it usually issues bonds for the amount and pays the bondholders interest thereon. No one would have the effrontery to argue that such interest was an operating expense. Or, (2) it may make a series of annual payments in proportion to business done or gross earnings. These payments are precisely the same in nature as the interest payments under the first method, and so closely are such things figured when franchises are bid for that the one is the precise equivalent of the other.

These payments are rents and should not even be included in operating expenses; to ask that they be considered taxes and deducted from the amount paid the State is to ask exemption for one of the most valuable items of property the companies use, namely, their franchises.

Reports made to the Commission.

In the reports asked for by this Commission from the different public-service corporations, the effort has been made to ascertain:

First, the gross earnings from operation; under which would not be included any returns or revenues obtained from investments in property not directly used in the peculiar business in which the corporation was engaged. Thus, for example, revenues obtained from the sale of railroad lands or from investments of surplus or sinking funds held by other classes of corporations would not be included in the gross earnings.

Second, the operating expenses in the sense above defined, exclusive of all items belonging to the capital account, and of the nature of interest, rents, etc.

Earnings of similar companies outside of California.

In order to ascertain whether the reports made to us by the California companies were normal or whether they represented exceptional and unusual conditions, also for the purpose of obtaining a check upon the accuracy of the returns made to us, the Commission has ascertained, as far as possible, from other sources what the proportion

of operating expenses to gross earnings was for each of these different classes of corporations in other parts of the country. In this way it is thought that the classes into which the different corporations fall, according to the percentage which their net earnings bear to the gross earnings, have been representatively determined, and the various types of corporations ascertained. The detailed figures for each of these will be given in connection with the special discussion of the taxation of each class of corporations.

Rate of capitalization.

The rate of interest which should be allowed in equity to investors in each of the different classes of corporations is a matter which is often discussed in connection with fixing the rates or charges for their services to be allowed public-service corporations by county and city boards and the like. The Commission has made no effort to solve the much vexed question of what the rate *ought* to be, but only what rate is accepted. It has simply undertaken to ascertain, as nearly as may be, in the case of each of the various classes of corporations, approximately what rate the market quotations seem to indicate as one satisfactory to the investors themselves. Thus, for example, it was ascertained that the investors in the securities of the Southern Pacific Company in 1904 were contented with 5.655% returns on their investment, which allowing 1% additional for taxes, would give us 6.655% as the basis of capitalization. The Santa Fe investors were content with 6.172%, and so on. The percentages to be used will vary somewhat with the risk of the business and are ordinarily higher for small companies. This offsets to some extent the fact that their net receipts are a smaller proportion of their gross income than in the case of larger companies, owing to the greater expense of operation.

The rates at which the net income of different classes of industries should be capitalized is fairly well known among business men, and the rates adopted by the Commission for the different classes of corporations are those which have generally prevailed.

The rate on property.

What constitutes a fair rate on the property with which to compare the effect of any given rate on gross earnings is an extremely intricate question. The prevailing rates of taxation as ascertained by the Commission throughout this State are: About $1.75 per $100 of assessed valuation for property outside of corporate limits, and about $2.55 per $100 of assessed valuation for property inside corporate limits. The average of all taxes both inside and out is about $1.825 per $100 of assessed valuation. The Commission has been inclined to think that the assessed valuation is about 60% of the true value. This percentage

varies in different parts of the State very largely, and varies considerably from year to year. It varies also from one piece of property to another. There is no practical method of ascertaining exactly what this average percentage is short of an attempt to revalue all the property of the State, which is equivalent to remaking the assessment rolls of each and every county. This is a task far beyond the means of the Commission and the time at its disposal. It is practically certain from the extensive investigation made by the Census Bureau and stated in another chapter of this Report, that farming lands are assessed on the average at about 65%, making taxes on this class of property on the average 1.14% of the true value. The tax rate on city property, being considerably higher, would offset to a considerable extent any lower valuation that may prevail in the cities. Even if property is assessed as low as 50% of its true value the average burden of taxation throughout the State is still close to 1%.

The Commission has been literally bombarded with so-called "evidence" submitted by interested parties that property is assessed for less than 60% of its true value. This "evidence" usually takes the form of *ex parte* statements as to assessed and market values, and sometimes of actual tax bills and deeds showing the sale of the property covered thereby at prices far above the assessed value. The ultimate effect of this "evidence" on the minds of the members is that these are more or less cleverly selected special cases, usually isolated, exceptions which rather prove than disprove the rule. Assessor after assessor has declared that he never knowingly assesses any property at less than two-thirds of its "full cash value" as defined by law, which, it must be remembered, is not the same as "highest market value." To offset the above evidence of undervaluation it would be easy to collect just as many instances of overvaluation. It is the average that counts, and *the average is fixed by the multitude of common people who pay taxes on their little homes or farms*, not by the shrewd speculators who evade taxes on property whose values they boom.

The Commission has assumed throughout this Report that property now on the tax rolls bears a burden of about 1% of its true value. It should be stated in this connection that the Commission uses the term "true value" or "full cash value" in the sense in which it is defined in the Code, namely, that value at which the property would be taken in payment of a just debt due from a solvent creditor. This is not the equivalent of the highest market value which the property might command under special circumstances. It should further be stated that the Commission means in this respect to include only property now on the tax rolls, and that in the nature of things no allowance is made or can be made for additional property such as personal property belonging to the owner of this class of property but concealed from the assessor

so as to evade taxation. This Commission holds that this is the only proper basis for comparison as to the actual tax rates, and regards the criticisms sometimes advanced to the effect that this rate makes no allowance for property which ought to be assessed and is not assessed, as not well taken. The fact is, that the property which we succeed in reaching under our present tax system bears on the average a burden of taxation equal to about 1% on its full cash value.

What constitutes a "fair rate" of taxation must be determined primarily by the needs of the different branches of the government. The amount which it is necessary to raise apportioned among the subjects upon which the levy is to be made will ultimately give the exact rate. But when we depart from the method of apportionment heretofore in vogue and establish a fixed tariff upon certain classes of tax subjects, as is proposed by this Commission, for the subjects elected for State taxation, we have to assume in advance what will ultimately be the rate necessary to be levied upon other property. The Commission is of the opinion that in the long run the various classes of property in the State will be called upon to contribute at the rate of about 1% per annum to the support of the different branches of government and that this amount is about what the services of the government are worth to the taxpayers, and sets approximately what the various branches of the government ought to levy.

In another sense, what constitutes a fair rate of taxation will ultimately be determined by the general consensus of opinion. The "fairness" of the tax rate depends primarily upon the value of the government's services to the taxpayer. This, like any other "value" not fixed by a price in the open market, is largely a matter of opinion. In the United States in general where most of the taxes are levied on property the rates run from about 1% to 1½% or in extreme cases 2% upon the true value of the property. Business men, especially those who deal in real estate, very generally reckon that 1% is the burden of taxation, and pretty generally agree that such a rate is fair and equitable. If the tax rate exceeds this by very much, there is usually a complaint and the government is regarded as extravagant or criticized for waste of public money.

The adoption of 1% as the basis of all computations and not the actual averages ascertained, namely, 1.14% for rural property and 1.53% for city property, is justified on the ground that the plan of separation proposed will reduce the present burden of taxation on real estate by about the amount of the fraction rejected.

Chart for computing the rate on gross earnings equivalent to a given rate on property.

The accompanying chart, prepared by Dr. T. M. Putnam, of the Mathematical Department of the University of California, which is

NOMOGRAPH FOR FINDING THE TAX RATE ON GROSS EARNINGS WHICH CORRESPONDS TO A TAX RATE OF ONE PER CENT ON PROPERTY
Explanation.—Find the percentage of net earnings to gross earnings at the bottom, go vertically to the diagonal marked with the selected rate of capitalization, then horizontally to the left and read the corresponding rate on gross earnings. Example.—A given corporation, has $50 net out of $250 gross, or 20%. The corresponding rate on gross earnings at the bottom, go vertically to 6 on the oblique lines, then horizontally to the left is 6%. The corresponding rate on gross earnings

Note.—In third line of "Explanation" of above diagram, read "is capitalized at *six* per cent" instead of "60 per cent."

known technically as a nomograph, shows, almost at a glance, what is the tax rate on gross earnings corresponding to any given tax rate on property for each percentage net to gross and at each percentage rate of capitalization, and saves the necessity of computing these problems.

To use the nomograph find the ascertained rate of net earnings to gross at the bottom, follow up perpendicularly until the line marked with the assumed rate of capitalization is reached, then go at right angles to the left margin and read the tax rate on the gross earnings. If we want to know what rate of capitalization is assumed by a given tax rate on gross earnings the percentage of net to gross being known, find where the line from the tax rate intersects the line from the net earnings percentage, and read on the fan-like diagonal lines the rate of capitalization sought.

The nomograph is drawn on the supposition that 1% on property is a fair tax rate. If any other rate is accepted, as 1½%, the same graph can be used by first multiplying percentage of net earnings to gross by the new rate, and using the product as the net earnings.

The nomograph has the advantage over the arithmetical computation of the rates that whereas the computation is simple enough for round numbers and flat rates, it becomes complex and tedious for other amounts and fractional rates; but these can be read as easily on the nomograph as the round numbers.

REVIEW OF THE LAW BY COMMISSION OF 1906.

The constitutionality of a tax on the gross receipts of corporations engaged in interstate commerce.

In writing the following synopsis of the decisions of the Supreme Court as to the power of the states to tax interstate carriers we have worked directly from the United States Reports. Much assistance was, however, found in the admirable treatise by Frederick N. Judson, of the St. Louis Bar, on The Power of Taxation, State and Federal, in the United States: St. Louis, 1903, especially Chapters III, VII and VIII. Mr. Treadwell went over the cases first and formulated the conclusions reached.

Of the several provisions of the Federal Constitution intended jointly to safeguard "the freest interchange of commodities among the people of the different states"* the one chiefly relied upon in connection with the taxation of carriers engaged in interstate commerce is paragraph 3, of Section 8, of Article I, which confers upon Congress the power: "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The dictum of Chief Justice Marshall in *McCulloch* vs. *Maryland*, "that the power to tax involves the power to destroy, etc.," was delivered solely with reference to the taxation of the "instruments employed by the Government in the execution of its powers," and no attempts to apply it as a prohibition of State taxation of interstate carriers, even when they are incorporated by the United States, have been successful.†

The difficulty of drawing a sharp line between the Federal powers and the State powers in the matter of the taxation and regulation of those great agencies of interstate commerce, like the railroads and the telegraph, which extend from one end of the country to the other, has troubled the courts since 1872. It is only recently that the problem has been definitely solved.

While the greater part of each of the two fields, in which each of the two great divisions of our Government may respectfully exercise its powers, is clear enough, yet the boundary of one seems to merge almost imperceptibly into that of the other at places. This has resulted in much litigation, and the decisions of the Supreme Court on some of the most vital points have occasionally seemed contradictory. In not a few instances the Court has apparently reversed itself.

*Justice Miller in *Cook* vs. *Penn.*, 97 U. S. 574.
†*Thompson* vs. *Pacific Railroad*, 9 Wallace 579; *Railroad Co.* vs. *Peniston*, 18 Wallace, 5.

However, the following points seem now to have been conclusively settled:

A. *As to the taxation of interstate carriers on an ad valorem basis:*

1. A State may tax the *property*, within its bounds, of railroad companies and other persons or corporations engaged in interstate commerce.

Railroad Co. vs. *Peniston*, 18 Wallace, 5, and later cases based thereon.

2. It may tax both the *tangible* and the *intangible property* of the carriers, provided only, that it may not tax a *Federal franchise*.

Central Pacific R. R. Co. vs. *California*, 162 U. S. 91.

3. A State may *value* that property by the "*unit rule*," *i. e.*, make a valuation of the entire property of the "system" of a given corporation engaged in interstate business, and tax *that proportion* of the entire property which the mileage in the State bears to the total mileage operated. Or, what is the same thing, may make the apportionment on the basis of business done.

State Railroad Tax Cases, 92 U. S. 575;
Western Union Telegraph Co. vs. *Taggart*, 163 U. S. 1;
Adams Express Co. vs. *Ohio*, 165 U. S. 194.

4. It may arrive at a valuation by the following methods:

(*a*) By adding the market, or fair cash, value of the shares of capital stock and the market, or par, value of the various kinds of funded indebtedness.

Justice Miller, in rendering an oft-quoted decision on this point, said: "It is therefore obvious that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

He added that this would be perhaps the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt; but that this was not the case. The system adopted by the statute of Illinois and the rule of the board preserved the principle of taxing all the tangible property at its value, and then taxing the capital stock and franchise at their value, if there was any, after deducting the value of the tangible property.

State Railroad Tax Cases, 92 U. S. 575.

(*b*) By considering one or more of several elements, or evidences of value, as: the cost of construction or equipment, the market value of

the outstanding securities, the gross earnings and the net earnings, and all other matters appertaining thereto.

Indiana Railroad Cases, 154 U. S. 421 and 439.

5. The court has recognized the fact that the value of property of this class depends largely on the earnings. In some of the decisions already referred to this is made clear. Thus in the *Indiana Railroad Tax Cases* (p. 445) it was said:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. *But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value, it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us: it is impossible to disintegrate the value of that portion of the road within Indiana and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the State. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt.*"

B. *As to the taxation of carriers or of interstate business by methods other than the property or ad valorem tax:*

1. A State may not levy a license tax as a prerequisite in carrying on interstate business.

In *Osborne* vs. *Mobile*, 16 Wallace 479, decided in 1872, the Supreme Court decided that this could be done. But fifteen years later that case was overruled in *Leloup* vs. *Mobile*, 127 U. S. 640. The trenchant part of this decision reads:

"A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to refer to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions

which have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just constructions of the Constitution in all its parts."

The conclusion was, therefore (l. c., page 648), "that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

See, also: *Webster* vs. *Bell*, 68 Fed. 183;
McCall vs. *California*, 136 U. S. 104;
Norfolk and Webster R. Co. vs. *Penn.*, 136 U. S. 114;
Crutcher vs. *Kentucky*, 141 U. S. 47.

2. A State may levy a license tax on local or interstate business performed by interstate carriers.

Osborne vs. *Florida*, 164 U. S. 650;
Postal Telegraph Cable Co. vs. *Adams*, 155 U. S. 688.

3. A State may not tax freight, in interstate commerce, nor interstate telegraph messages.

State Freight Tax Case, 15 Wallace, 232;
Telegraph Co. vs. *Texas*, 105 U. S. 460.

4. A State may levy a tax *in proportion* to the gross receipts from interstate commerce under certain conditions and in certain forms. But may not tax the receipts as such.

The earliest case involving this point seems to be one decided in 1872, at about the same time that the State Freight Tax case, above referred to, was decided. This is known as "The State Tax on Gross Receipts," 15 Wallace, 284:

The State of Pennsylvania levied a three fourths of one per cent tax on the gross earnings of every railroad incorporated under its laws, and the tax was held valid, even when it covered the earnings of a State railroad on coal carried out of the State.

This case was distinguished from the State Freight Tax case on the ground that not everything which affects commerce amounts to a regulation of it within the meaning of the Constitution.

The court said, in words that often reappear in the later decisions on the same point, after showing that the states have authority to tax the *property*, real and personal, of all corporations whether engaged in interstate commerce or not:

"We think also that such tax may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations,

the states are not obliged to impose a fixed sum upon the franchises or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. There certainly is a line which separates that power of the Federal Government to regulate commerce among the states, which is exclusive, from the authority of the states to tax a person's property, business, or occupation, within their limits. The line is sometimes difficult to define with distinctness. It is so in the present case; but we think it may safely be laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between states, have become subject to legitimate taxation."

In commenting on these decisions, Mr. Judson says:

"It seems to have been conceded that a State can levy a tax upon net earnings, and the court said that it is difficult to state any well-founded distinction between a State tax upon net earnings and one upon gross earnings, that net earnings are a part of the gross receipts, and that the gross receipts are a measure of approximate value.

"Neither of these cases has been overruled; but the authority of the decision in the case of the State Tax on Gross Receipts was for a time seriously impaired by decisions of the court apparently inconsistent with the broad statement therein of the right to tax gross receipts, on the ground that they have passed into the treasury of the company and lost their distinctive character as freight."*

"It will be noticed that the mileage rule of apportionment of interstate properties was not suggested or considered in the case of the State Tax on Gross Receipts. The case presented was that of a railroad whose line was entirely within the State, but which did an interstate business through its connections with other lines leading out of the State."

We come now to a series of cases in which a State tax on gross receipts from interstate trade has been held invalid. The first is *Fargo* vs. *Michigan*, 121 U. S. 230. The Merchants' Despatch Transportation Company, a New York corporation, owned certain cars which it leased to the railroad companies which operated them. The State of Michigan assessed a tax on the gross receipts of that company in the State measured by the unit rule and based on receipts from the transportation of freight from points without to points within the State and from points within to points without, but did not tax the receipts from business passing entirely through the State. This case was distinguished from the Railway Gross Receipts case (which it did not distinctly overrule) on the grounds (1) that the Merchants' Despatch was not a Michigan

*See *Steamship Co.* vs. *Pennsylvania*, 122 U. S. 326; *Fargo* vs. *Michigan*, 121 U. S. 230.

corporation, and (2) that in the Pennsylvania case the money was in the treasury of the company in that state, while in the Michigan case the money for the freight was probably never in that State and hence not property subject to taxation.

In the next term of the court the theory that gross receipts could not be taxed was more fully developed in the case of the *Philadelphia Steamship Co.* vs. *Pennsylvania*, 122 U. S. 326. In this case Pennsylvania had attempted to impose a tax on the gross receipts of railroads, canal, steamboat, and other transportation companies. The steamship company in question was a Pennsylvania corporation running steamers between Philadelphia and Savannah and from New Orleans to foreign ports. The court held that interstate commerce carried on by ships at sea is national in character and must be covered by one general rule. The court said:

"If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the State can not tax the transportation, may it, nevertheless, tax the fares and freight received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning.

"No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in State Tax on Railway Gross Receipts was placed is not tenable; that it is not supported by anything decided in *Brown* vs. *Maryland;* but on the contrary, that the reasoning in that case is decidedly against it."

On the basis of these decisions the State courts quite generally held that gross receipts of carriers in interstate commerce could not be taxed.

But there is another line of decisions which seem to modify the effect of the line running from *Fargo* vs. *Michigan* without expressly overruling them. These connect with the cases sanctioning the taxation of property. But so far as they affect the question of the actual measurement of a State tax by the gross receipts, including an equitable portion of the receipts from interstate commerce, they are more recent than the other line and have ended in such emphatic re-assertion that they seem absolutely conclusive.

In 1881 Maine inaugurated a tax on each railroad in the State entitled "an annual excise tax, for the privilege of exercising its franchises and the franchises of its leased roads in the State." This tax "is in place of all taxes upon such railroad, its property and stock." The amount of this tax was calculated on the basis of the average gross receipts per mile of road. It is important to note that the tax was payable in April and was computed on the basis of gross receipts for the year ending June 30 in the preceding year. The following provisions covered interstate railroads:

"When a railroad lies partly within and partly without the State, or is operated as a part of a line or system extending beyond the State, the tax shall be equal to the same proportion of the gross receipts in the State, as herein provided, and its amount shall be determined as follows: the gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the State, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in the State shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within the State."

The Grand Trunk Railroad Company, a Canadian corporation, operated a road in Maine, which it leased, and became subject to this tax. The railroad opposed the tax on the ground that the case of the State tax on gross receipts had been overruled in *Fargo* vs. *Michigan*, and this contention was sustained by the United States court. On appeal to the Supreme Court the decision of the lower court was reversed and the tax was held to be valid. The court said:

"The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; *and that a tax of this character is within the power of the State to levy there can be no question.* The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the

franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed.

"The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred.

"The case of *Philadelphia and Southern Steamship Co.* vs. *Pennsylvania,* 122 U. S. 326, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the State, derived from the transportation of persons and property between different states and to and from foreign countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it."

Maine vs. *Grand Trunk Ry. Co.,* 142 U. S. 217, 228.

From the decision above four justices dissented, which was regarded as slightly impairing its authority. But in *Erie R. R. Co.* vs. *Pennsylvania,* 158 U. S. 431, the same principle was reaffirmed.*

The most recent case on the subject is *Wisconsin & Michigan Ry. Co.* vs. *Powers,* 191 U. S. 379.

The right of the State to levy a tax on the gross earnings of an interstate carrier was involved in this case, together with one other point not connected with our question.

On the point in which we are interested the court said:

"We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is a tax on 'the property and business of such railroad corporation operated within the State,' computed upon certain percentages of gross income. The prima facie measure of the plaintiff's gross income is substantially that which was approved in Maine vs. *Grand Trunk Railway Co., 142 U. S. 217, 228. See also Western Union Telegraph Co.* vs. *Taggart, 163 U. S. 1. Decree affirmed."*

This was a unanimous decision, except that Mr. Justice White, not having heard the argument, took no part in the decision. He concurred, however, in the decision in *Erie Railroad* vs. *Pennsylvania,* a case involving the same points.

It appears, then, that a State tax on the property, or on the franchise, measured by the gross receipts is valid and is not a "regulation of interstate commerce," in the sense in which the right to regulate commerce is prohibited to the states by the Constitution.

*See, also: *Lehigh Valley R. R. Co.* vs. *Penn.,* 145 U. S. 192; *Western Union Telegraph Co.* vs. *Taggart,* 163 U. S. 1.

Proportion between net and gross earnings of railroads.

The statement is sometimes made that "a gross earnings tax on railroads is contrary to public policy, because *net earnings increase faster than gross earnings.*" This statement is based on the trite observation

that a large part of a railroad's expenses are "fixed expenses" and do not vary with the amount of business done. This has been most forcefully stated by Mr. Acworth, an English railroad authority:

> In a hundred units the traffic costs the company 100 shillings for interest and expenses. It is probably a fair estimate to say that 1,000 units will cost, not 1,000, but 325 shillings. The figures are arrived at as follows: Interest on capital remains invariable; this, as we have seen, represents one half the total cost. Of the working expenses fully one half, according to estimates made by experts in different countries, which largely agree, remain constant. The remaining half is taken to increase proportionately to the increase of traffic. The old expenditure for the 100 units was, then, 50 plus 25 plus 25; the new expenditure is 50 plus 25 plus 250, equals 325 shillings.

There can be no doubt of the general accuracy of this analysis, and if *rates remain the same and the investment remains the same* the net earnings will increase faster than gross earnings. But, nevertheless, under the constantly varying conditions of American railway transportation the value of this formula for determining the proper basis of taxation *has not been demonstrated*. As an argument in favor of a net earnings tax as against a gross earnings tax it fails because it overlooks at least one very important factor. That is, that the rates have been reduced, the investment increased and the proportion of expenses has been increased. *The proportion to gross earnings of those particular net earnings that have always been selected as the appropriate items for taxation, if taxation is to be based on net earnings, has not in the United States as a whole varied two points either above or below the average (which is 33.6%), during the past fifteen years.* And this has occurred in spite of the fact that the gross earnings have increased in the last decade from $6,050 to $9,306 per mile of road, an increase of 50%. That is, net earnings are, as a matter of fact, nearly proportional to gross earnings and keep the same proportion year after year, even though the operating expenses per unit of business may decrease. During those fifteen years, at least, a government using a gross earnings tax would have come off just as well in matter of revenues as one using a net earnings tax.

The argument, therefore, that, because the cost per unit of traffic must have decreased, therefore the relative net earnings per unit or per mile of line must have increased, is not sustained. As stated above, the net earnings of all railroads in the United States have not changed in their proportion to the gross earnings. This is accounted for by the fact that in order *to get the increased traffic the roads have been obliged to reduce their rates and increase their expenses*, and the 933,674 units of traffic brought in, not $10,300 gross, the amount that would have been received had the roads carried the new traffic at the same rates as the old, but only $9,306, and cost to carry not $5,804, as called for in theory, but $6,308; so the net earnings have *not increased more rapidly than the gross earnings* with the increase in traffic.

From a further examination of the returns made by the railroads to the Interstate Commerce Commission for the past fifteen years it is obvious that it would not have made any substantial difference, either to the roads or to the government, whether the tax were based on the gross earnings at, say, 4%, or on net earnings at, say, 12% or 15%. For the general run of railroads throughout the country, or in any one of the ten groups into which the Interstate Commerce Commission divides the country, the proportions are so nearly stable that no substantial difference would result from either method. It follows, therefore, that the simpler method is to be preferred, and that is to base the tax on the gross earnings.

Furthermore, as suggested in the preceding paragraph, a net earnings tax, to be just to the government, would have to be so high, 15% to 20%, as to place a very high premium on false returns.

The question of the equity of the gross earnings tax as between different roads can be tested somewhat roughly by comparing the taxes now paid on the ad valorem plan with the taxes that would be paid on the gross earnings plan. This is done in the following table for the more important railroad systems of the State. It is not argued that the present system is equitable as between the different roads, but it affords the easiest and most readily available basis of comparison.

Name of Road	Tax on Property, Present System 1904	Per Cent of All Taxes on Railroads	Tax on Gross Earnings at 4 Per Cent Proposed System	Per Cent of All Taxes on Railroads	Column 3 Reduced to Same Total as Column 1
Southern Pacific System	$1,349,425	75.85	$1,508,958	74.17	$1,319,484 30
Santa Fe System	306,372	17.22	375,109	18.44	328,047 60
California Northwestern and North Shore	62,612	3.52	82,027	4.03	71,693 70
Nevada-California-Oregon and Sierra Valleys	4,696	.262	7,661	.37	6,582 30
Salt Lake Road	27,237	1.530	24,423	1.205	21,436 95
Nevada County Narrow Gauge	3,397	.191	5,125	.252	4,483 05
Pacific Coast	6,959	.391	5,806	.285	5,070 15
Pajaro Valley Consolidated	2,881	.161	2,535	.124	2,205 90
Sierra Railway	8,424	.472	14,657	.721	12,826 30
Boca and Loyalton	5,501	.308	6,936	.341	6,066 30
Lake Tahoe	1,700	.095	1,265	.062	1,102 95
Totals	*$1,779,174	100.00	$2,034,502	100.00	$1,779,000 00

In the case of the larger roads the change of system would not materially alter their proportion of the total taxes on railroads. But in the case of some of the smaller roads the changes would be quite important. In the case of the California Northwestern and North Shore, it means an increase of one seventh in its proportion of taxes. This is probably due to the ferry traffic connected with this road, which make its earnings high compared to the property used. In the case of the Nevada-California-Oregon and Sierra Valleys Railroad, the increase

*Includes state, county, city, and district taxes.

is quite large, and in the case of the Sierra Railway is nearly 5%. These are relatively very profitable roads. But returns for later years show less increase.

Definitions of gross earnings.

There are, as has already been pointed out, two ways of defining the "gross earnings within the State" of interstate railroad systems, which may be used in computing the tax on the property and franchises.

The Maine definition.

The first is like that of Maine, which defines the "gross earnings within the State" of a railroad operating both within and without the State as that proportion of the entire earnings which the mileage in the State is of the total mileage.

The Minnesota definition.

The second is like that of Minnesota, which, in case of a railroad operated both within and without the State, requires a report of all earnings from business beginning in and terminating in the State, and also that proportion of the earnings from interstate business which the mileage each item of such traffic was carried within the State bears to the total mileage such item was carried.

The following explanation of the Minnesota plan was given to the Ontario Commission by Mr. Staples, one of the three members of the Railroad and Warehouse Commission, upon which devolves the duty of obtaining and verifying the reports of the gross earnings of the railroad companies:

> In Minnesota we take every shipment by itself over each line, no matter where it originates; if it goes into Minnesota or through Minnesota, even if only one mile, the tax is the proportion of that one mile to the total mileage of the shipment. Take as illustration a shipment over 180 miles of road, of which 7 miles is in Minnesota; the assessment would be seven one hundred and eightieths of the total charges. In its report the railway must show the entire gross earnings of the entire system, but of course if a shipment originated in Winnipeg and went down, say 100 miles, not touching Minnesota, we have nothing to do with that for taxation purposes. We only assess those shipments in which we are interested, that is, those shipments which touch Minnesota.

Discussion of these definitions.

The relative advantages of the two systems turn entirely on the situation of the State which applies them and the character of the railroad business done within its boundaries. The difference between the two methods may be simply, although very crudely, illustrated by an imaginary railroad traversing two states only. In one State, which

we will call A, the road does a large local traffic of, say, $10,000,000 per annum; in the other State, B, it has a small local traffic, say $2,000,000 per annum. The interstate traffic we will assume, for the sake of simplicity, runs mainly to and from a metropolis on the extreme border of A clear across A and B to and from a city on the farther boundary of B. The mileage in A is 500, in B is 400. The total through traffic is $15,000,000. By the Maine plan, State A would tax five ninths of $27,000,000, or $15,000,000. By the Minnesota plan it would tax $10,000,000, the intra-state traffic, plus five ninths of $15,000,000, or about $8,333,000, in all $18,333,000. That is, in the one case State A would be giving its neighbor B a share, as it were, in the revenues derived from its own large local traffic. In the other case it would be keeping all this for itself. The United States courts, being interested in the protection of *interstate commerce* only, would not interfere in either case, although if State B in our illustration undertook to apply the Maine method it would obviously be taxing property or earnings outside of its boundaries. If both states applied the same method, obviously no objectionable double taxation would arise. But if State A applied the Minnesota method and State B the Maine method, the railroad would have ground for objections, as being doubly taxed on a large part of its earnings. Clearly, the most equitable system, if universally applied, is the Minnesota system. It does not undertake to get taxes on traffic outside its own bounds.

California, being surrounded by a vast area of sparsely populated territory on the one side and water on the other, is in the position of State A in our illustration. She affords railroads large and lucrative local traffic, compared with which that offered by Nevada, Utah, Arizona and New Mexico is quite small. Furthermore, a very large part of the through traffic over the roads entering California is equitably due California. It consists of the imports and exports of California merchants, and owes nothing to Nevada or Arizona, except the privilege of passing through. For those states to levy a tax on California's commerce passing through their boundaries smacks of the tolls levied by the robber barons on the Rhine. But such tolls must, however, be submitted to under the construction of the interstate commerce clause of the Constitution. There is, however, no such necessity forcing a surrender of the revenue on purely intra, or local California, traffic.

The foregoing analysis is theoretical and illustrative merely. The essential question is how the two systems would affect the revenues. We have two large interstate railroad systems now in operation and two more in course of construction. The Southern Pacific Company, being an operating company merely, reports its constituent roads separately to the State Board of Equalization. Of the constituent com-

panies, only one—the Central Pacific—is an interstate road, the others beginning and terminating within the State. In 1904 the Central Pacific's gross earnings in and out of the State, excluding ferry and river traffic, were $19,264,000, as reported to the State Board of Equalization. This, apportioned on the Maine plan, using main track mileage* only, would give California a gross earning of $10,518,326.23.

The State Board of Equalization requires the railroads to report their gross earnings in California computed on a plan which closely approximates the Minnesota system. It should be said, however, that as these figures serve no very important purpose, being for general information only, there is some doubt as to the care with which they are compiled. The State Board itself has criticized them as inaccurate in several cases. But they are the best that can be had, and hence are used.

From this source we find the gross earnings in California of the Central Pacific apportioned by the Minnesota plan to be $10,595,383.34—larger by $67,000 than by the Maine plan. The difference is not very great.

A somewhat larger proportional difference is found if we take the Southern Pacific Company's system as a whole. The $90,000,000 which that great system earned in 1904 was at the rate of $9,842 per mile of road operated, or for the 3,350 miles in California about $33,000,000. The gross earnings reported to the State Board of Equalization were $35,800,000, a difference in favor of the State, under the Minnesota plan, of at least $2,800,000, or with a 4% tax a matter of $112,000.

The same computation applied to the Santa Fe system produces the opposite result. Of the 8,300 miles in this system, 1,260 miles lie in California. The gross receipts of the entire system were $68,171,200, or $8,214 per mile, which gives $10,325,000 for California's share of the gross receipts, estimated according to the Maine plan. The road reports to the State Board of Equalization some $10,149,102.28 as its gross earnings. By this showing the returns would be better under the Maine plan than under the Minnesota plan by $176,000 gross earnings. But there is some doubt as to whether all the items called for are included in the Santa Fe report, and more recent corrected reports show the reverse to be true.

If these two instances of typical railroad systems extending through several states are at all conclusive, and there is no reason to suppose they are not so, then it makes practically no difference whether we choose the Maine system or the Minnesota system. The selfish interests of California will be safe in either case, and jealousy of neighboring states may slumber. This being the case, we may fall back on theoretical considerations of what is likely to be most fair to the railroads, to California, and to other states and to our neighbors.

*The question as to whether main track or single track mileage should be used will be discussed below.

The approved definition.

From this point of view, gross earnings may safely be defined so as to include:

(1) All receipts from business beginning and terminating in California. This all belongs to California, and no system of apportionment which allows or permits another State to assume the right to tax any portion of this can be approved.

(2) The receipts from traffic other than by sea between points, one of which is in California and another in some other State, whether in or out bound, should be assigned to California in proportion as the mileage of such traffic in the State is to the total mileage covered by such traffic.

(3) The receipts from traffic originating outside of California, other than that which comes by sea, and which passes entirely through California, should be assigned to California in proportion as the mileage in California is to the total mileage of such traffic.

In the light of the preceding discussion, these three propositions are so self-evident that they require no further proof or demonstration.

Definition of mileage.

Under the Maine system a question of considerable importance is the definition of the mileage. Shall we take miles of main track, or the miles of all tracks, reducing double track, spurs, and sidings, as that basis? Railroad reports generally use main track for most apportionment purposes. But the more equitable basis for purposes of taxation is "all tracks," inasmuch as the presence of double track, of spurs and sidings generally indicates a denser traffic.

Under the system proposed above this question is of no importance, mileage meaning the distance a given shipment is hauled.

SECTION 3.

TAXATION OF CAR COMPANIES.

The present system.

The taxation of companies operating their own cars over the railroads of the State is in an especially unsatisfactory condition. Except in the case of the Pullman Company, which is assessed by the State Board of Equalization, on the basis of the average number of cars which it operates in the State during the year, the only taxes levied are those assessed by the county assessors on such cars as happen to be found in the State on the first Monday in March. This, in spite of the fact that a considerable number of such cars find their way into the State during the year, amounts in actual practice to the taxation of those cars only which are owned or operated in California by some local company or agency, and a few scattering cars of other lines.

The total assessed valuation of car companies of all sorts in 1905 was $981,485, and the taxes paid amounted to $18,831.17. Of this amount the Pullman Company paid $10,528.85.

The following table shows the assessment of the car companies in 1905:

Table of Car Company Valuations.

	Assessed Valuation
Pullman Company	$500,000
American Fast Freight Line	300
Anheuser-Busch Brewing Company	1,200
Armour Packing Company	800
Kansas City Fruit Express	400
American Palace Horse Car Company	2,400
Glessenkamp Carriage Line	325
Independent Oil Refrigerator Company	600
Live Poultry Transportation Company	1,200
Merchants' Despatch and Transportation Company	800
Milwaukee Refrigerating Transit Company	1,200
Swift Refrigerating Company	800
Union Refrigerating Transportation Company	4,300
San Francisco Breweries Limited	6,400
San Francisco Refrigerating Despatch Company	82,475
Union Tank	50,600
Associated Oil Company	13,500
Mission Transportation and Refrigerating Company	172,825
Continental Fruit Express	35,125
Fruit Growers' Express	93,825
American Refrigerating Transit Company	9,100
Milwaukee Refrigerating Transit Company	300
Swift Refrigerating Car Line	1,500
Streets Western Stable Car Line	500
Puenta Oil Company	1,000
Total	$981,485

Earnings of car companies.

As to the earnings of these companies very little original information is available. The Pullman Company positively declared itself unable to furnish a statement of its earnings in California, as its accounts are not kept with reference to State boundary lines. It has never rendered such an account to the State Board of Equalization. The other companies make the same plea.

The best information as to the earnings of car companies, other than the Pullman Company, is that given in the Report of the U. S. Commissioner of Corporations on the Beef Industry, House Document No. 382, 58th Congress, 3d Session.

The summary of the conclusion as to earnings (see page 281) was that the gross earnings per annum were from $200 to $240 per car, and that the net earnings per annum, with due allowance for depreciation, varied from $75 to $150 per car. At the lowest rates this makes the net earnings about 37½% of the gross; at the highest rates, 62½%. From this information it appears that the car companies engaged in the various lines of freight business earn about 45% net per annum and should pay at the rate of about 7% per annum on their gross earnings, if the tax on gross earnings is to equal 1% on the value of the property.

The Pullman Company reports to the State Board of Equalization the average number of cars in the State each year. This average is determined by taking the total number of cars on each "line" running regularly into California and assigning to California that proportion which the mileage of these cars bears to the total mileage over which they ply. Thus if there are five trains with three Pullman cars in each running continuously each way between some California point and Chicago over a certain route or "line," it takes 30 cars to "fill the line," and if one fifth of the mileage is in California her share of those cars would be one fifth of 30, or 6. If some of the cars run only part of the year, say three months, or one fourth of a year, they count only as one fourth each. This method takes no account of special or extra cars and cuts out all time spent between trips or in shops or under repairs. It takes into account only the regular cars running continuously. In this way in 1905 the Pullman Company reported 61.979 standard cars and 37.640 tourist cars as California's share.* It values the standard cars at $5,000 each and the tourist cars at $1,250 each, making a total of $356,945. *This covers only the value of the physical property.* To this the State Board of Equalization added $143,065, presumably for the franchise, but possibly to cover the amount by which the cars were undervalued, making the total assessment $500,000.

*This is a total of less than 100 cars for California. In a recent interview given to a Los Angeles paper one of the officers of the company stated that "60% of the 5,000 cars owned by the Pullman Company are used to carry passengers to and from California."

In the absence of any statement from the Pullman Company as to its earnings, although such a statement was repeatedly requested, we are forced to make our own estimate. The cars on the "overland limited" make the trip to and from Chicago in "less than three days," or an average of 800 miles a day. Time lost between trains is excluded by the method by which the average number of cars is struck. Cars in other trains make less daily mileage, those on the five-day trains making a little less than 500 miles per day. Cars operated entirely between California points probably make even less mileage per day. It is very conservative to assume that the average daily mileage for standard cars is over 400 miles, and that of the tourist cars over 300 miles. The U. S. Bureau of Corporations, in the report above referred to, quotes Mr. George C. Wilson, representing the Armour Car Lines and the Continental Fruit Express, as saying that a large percentage of their cars made 350 to 400 miles a day—this allowing for delayed trains. Certainly the Pullman cars running in passenger trains make, on the average, better time and more mileage than any freight cars. It is further conservative to assume that the cars are run nearly half filled, for the obvious reason that if not the company would run fewer cars. This would give as a very conservative average at least 12 passengers to each standard car. The Pullman Company receives from the railroads one cent a mile for the use of the cars and charges each passenger an average of about ½ cent a mile in standard cars and about ¼ cent a mile in tourist cars. This makes the average mileage earning per standard car, counting 12 passengers only, about 7 cents, and for tourist cars, at 16 passengers, 5 cents.

The following figures, based upon the foregoing, give a very conservative estimate, probably far below the truth, of the gross earnings of the Pullman Company, in 1905:

Rough Estimate of the Gross Earnings of the Pullman Company in California.

62 standard cars, 400 miles per day, 365 days, at 7 cents per mile, earn per annum	$633,640 00
38 tourist cars, 300 miles per day, 365 days, at 5 cents per mile, earn per annum	208,050 00
Total	$841,690 00
In 1906 the gross earnings were, by the same method	$1,012,875 00

That the above is very conservative and probably far below the truth is seen from the fact that it allows only $28 a day per standard car, and $15 per day for tourist cars.

The Pullman Company, although repeatedly asked to do so, failed to furnish this Commission with a statement of its gross and net earnings. The following figures were obtained from the newspapers:

Income Account, Pullman Company.

Total revenue		$29,588,642
Expenses of operation	$15,344,741	
Depreciation on cars and reserve for depreciation on all property	2,609,422	
Dividends declared	5,919,984	
Proportion of net earnings of cars paid associated interests	744,421	
		24,618,568
Net surplus		$4,970,074
Surplus brought forward		22,151,946
Surplus		$27,122,020

According to this showing the net earnings are 36% of the gross earnings, the same as for steam railroads.

At 4% of the gross earnings the Pullman Company would pay the State at least $40,000 per annum, or fully threefold the taxes actually paid.

Taxation of car companies in other states.

Few of the states make a success of the taxation of this class of companies. It is probable that New York, Massachusetts, and Pennsylvania, which include these companies in their general corporation taxes, are most successful, but the published accounts do not show the returns for all companies.

The states which levy on gross earnings base the rate on earnings made on business beginning and ending in the State. The rates are as follows: Florida, ½%; Georgia, 2½%; Maine, 4%; Maryland, 2%; Minnesota, 3%; New Jersey, 2%; New York, in addition to other taxes, ½%; Texas, 2½%; Vermont, 5%. The returns in Texas amount to $7,229.65 from sleeping cars only; those in other states are smaller.

The constitutionality of a gross earnings tax.

These companies are all engaged in interstate business. The constitutional restrictions are precisely the same as those which apply to the taxation of railroads. (See chapter on railroads.)

Objections raised by the Pullman Company.

In long oral arguments presented by the attorneys for the Pullman Company before the Commission, in lieu of the statement concerning earnings requested of the company, and in letters addressed to the Commission, that company objected strongly to any tax measured by the gross earnings.

The objections raised were three in number. In the first place it was urged that the earnings of the company from interstate business could not be taxed. When, however, it was pointed out that the tax was to be a tax on the property and franchises of the company in an amount

to be measured by the gross earnings and that such a tax had been fully sanctioned by the United States Supreme Court, this line of argument was dropped.

The second objection was that a tax on the gross earnings would exceed a tax on the *tangible property*, namely, the cars, used in the State. This objection is stated in a recent letter to the Chairman of the Commission, as follows:

> I (Mr. Fernald, representing the Pullman Company) recall distinctly that in our conversation, you (Governor Pardee) insisted that it was the net results to the company which should govern the taxation of its property, rather than the value of the property* which it owned. * * * * * This position we can not concede, and must protest against its application to the taxation of this company's property. The fact that the company has valuable property elsewhere and is a prosperous company can not, and should not in fairness, be considered in fixing the value of its property for taxation.
>
> This company has certain property which is used in California, to wit, sleeping-cars, a greater part of which are used in interstate commerce and run beyond the limits of the State of California. Some few cars are used partly in interstate commerce, and partly in intrastate commerce, although not running regularly beyond the limits of the State, and the company is perfectly satisfied to pay taxes to the State of California on its property fairly therein, on the same basis that other property in the State is taxed, and if the company is to pay such tax in a commuted form as by a percentage of gross earnings, it respectfully insists that the basis of such gross earnings should not be so fixed as to produce a tax in excess of what its tax would be upon a property valuation at the same rate of levy that other property in the State is taxed.

In this contention the company overlooks the obvious fact that it owns and uses in this State much valuable property other than cars and that the "net result to the company" is what determines "the value of the property which it owned." The value of the property of the Pullman Company, as a going concern, is determined by the same thing that fixes the value of an orange grove in bearing, namely, its net income. We may in this connection paraphrase the opinion of the United States Supreme Court in the Ohio Express Company cases, quoted in the preceding section, and say:

"No more reason is perceived for limiting the valuation of the Pullman Company to its cars than that of railroad, telegraph, and express companies, to roadbed, rails, and ties; poles and wires; or horses, wagons, and furniture. The unit is a unit of use and management; and the cars; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in California, possess a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of this company as the others."

The third objection was that the Pullman Company has no account of its earnings in the State of California, including California's share of interstate earnings, and that to keep such an account merely for

*If this read "value of tangible property" it would more nearly express the position taken by the Commission.

purposes of taxation would involve considerable expense, which would be in effect an additional tax. It was claimed that to keep such an account would "incur an expense which would probably run to an amount equal to the tax" (presumably the present tax of $10,000 per annum!). No instance is known in which any state or government allows its taxpayers a rebate in taxes on account of the expense incurred in furnishing the information necessary in order to levy the taxes. Mere unwillingness to spend the money necessary to furnish the information would have no merit as an objection to any tax, and would not be considered here at all except for the fact that the company lays such great stress upon it. In the opinion of the Commission, the probable cost of keeping a separate account of the proportion in which California should share in each passenger fare paid by travelers coming from or going to outside points to or from California points has been grossly exaggerated by the company. The railroad companies find no difficulty in rendering accounts in the desired form, both for passengers and freight, and their accounts involve far more items than the two or three million tickets issued by the Pullman Company to California passengers. With the modern electrical tabulating machines now in use by the freight auditing departments of the great railroads any items in addition to the regular accounts kept for general purposes can be obtained at relatively small additional cost.

The three objections raised by the Pullman Company seem to the Commission to have no merit.

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